INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
International Arbitration Tribunal

CASE NUMBER 01-21-0000-4309

SECOND PARTIAL FINAL AWARD (CONCERNING SANCTIONS UPON RESPONDENTS FOR VIOLATIONS OF TRIBUNAL ORDERS)

ARBITRATION PURSUANT TO
THE COMMERCIAL ARBITRATION RULES OF
THE AMERICAN ARBITRATION ASSOCIATION

BETWEEN:

TELECOM BUSINESS SOLUTION, LLC, on its own behalf and derivatively, on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED, and LATAM TOWERS, LLC, on its own behalf and derivatively on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Claimants,

vs.

TERRA TOWERS CORP., TBS MANAGEMENT,S.A., DT HOLDINGS INC., JORGE HERNÁNDEZ and ALBERTO ARZÚ,

Respondents,

and

CONTINENTAL TOWERS LATAM HOLDINGSLIMITED,

Nominal Respondent,

TERRA TOWERS CORP., TBS MANAGEMENT,S.A., DT HOLDINGS INC. derivatively and on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Counterclaimants,

vs.

TELECOM BUSINESS SOLUTION, LLC, LATAM TOWERS, LLC, F. HOWARD MANDEL, JOHN RANIERI, RYAN LEPENE, and AMLQ HOLDINGS (CAY) LTD.,

Counterclaim Respondents.

-and-

CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Nominal Respondent.

AMLQ HOLDINGS (CAY) LTD.,

Counterclaimant,

vs.

TERRA TOWERS CORP. and TBS MANAGEMENT,S.A.

Counterclaim Respondents.

The Context of this Award

1. This Partial Final Award, our second in this case, represents the culmination of more than nine months of contentious disputation between the Parties over the status of the Executive Management of Continental Towers LATAM Holdings, Ltd. (the "Company"). In one sense, this has been a sideshow to the merits of the arbitration, as it does not involve directly the determination of the merits claims the Parties have asserted against one another. But in another sense, the unrelenting efforts of the Respondents to secure the removal, and if not the removal then the marginalization, discrediting, and intimidation of the CEO and COO of the Company, are intrinsic to the merits.
2. In Phase 1 of this arbitration, we made a Partial Final Award (herein "PFA-1") directing specific performance of the provisions of the Shareholders' Agreement that require the Company to be sold to a third party. The Respondents have applied to the U.S. District Court for the Southern District of New York to have PFA-1 vacated. That application was made as a cross-motion to Claimants' petition for recognition and enforcement of PFA-1. A judgment on the Claimants'

award recognition-enforcement petition and Respondents' cross-petition for *vacatur* is awaited. If PFA-1 is recognized and enforced, the independence and integrity of Executive Management could materially affect whether the Company is in fact sold, and also could bear on the timing, price and other terms of the sale and the potential damages claims by Claimants and/or Respondents relating to the impact of Company Management actions or inactions on the sale process.

3. Further, there are merits claims to be heard in Phase 2 that Respondents violated Claimants' rights by misappropriating funds from the Company, for example by obtaining tower development payments for towers whose development was not approved by the pertinent committee of the Company's Board of Directors (the "Board"). Also reserved for Phase 2 are counterclaims by Respondents that Claimants have harmed the Company by refusing to approve towers development.

4. We have determined to issue this ruling on Claimants' application for sanctions in the form of a partial final award for several reasons. First, the closeness of the relationship of these Executive Management issues to the merits suggests that finality with regard to the status of Executive Management is desirable for the process of sale of the Company to proceed in an efficient way. A second reason is that Respondents have contested our jurisdiction to make this ruling and to conduct the proceedings that led up to it, including the orders we entered providing for an evidentiary hearing and the required production of evidence, which orders the Respondents elected to treat as ineffective for the stated reason that we were *functus officio*. Only a competent court can finally decide that *functus officio* question, and it is best for this arbitration that the question be decided while the arbitration is in progress if possible. A third reason also involves a question of arbitral jurisdiction that was raised by Respondents: Respondents have challenged as beyond this Tribunal's authority one of the orders with which Respondents have chosen not to comply on the ground that such order allegedly required conduct by non-parties, *i.e.* affiliates of Respondent DT Holdings, Inc. ("DTH"). Respondents' non-compliance led the Claimants to make the instant application for sanctions. As will be discussed below, in prior Orders we have rejected Respondents' position on these jurisdictional issues. The opportunity for interlocutory judicial consideration, if desired by any of the Parties, of our powers to make the decisions we make here, appears important to the effectiveness of the ongoing arbitration in multiple ways.

5. A fourth reason is that Respondents have objected to the proceedings leading to this Award on the ground that the Tribunal is (in the phrasing of the Federal Arbitration Act ("FAA")) "evident[ly] partial[]." We view that contention as unwarranted but it is not an issue we can decide. It is not known by the Tribunal whether Respondents have presented that issue to the competent administrative authority, the AAA's International Centre for Dispute Resolution ("ICDR"), or whether they have presented the issue and failed to obtain an order from the ICDR disqualifying any member of the Tribunal. In a case with so much remaining to be decided, and important stakes for all Parties, a question of evident partiality already raised repeatedly by Respondents over a period of several months should be judicially determined at the earliest opportunity if Respondents wish to pursue it.
6. Finally, there is little question that the instant motion for sanctions presents a "separate and independent" claim – in essence the Respondents' claim that senior management of the Company are unqualified for their roles by reason of partisanship for Claimants and improper conduct worthy of criminal prosecution (which may also be viewed as the Claimants' claim that this Tribunal should impose sanctions because Respondents' views of senior management of the Company has not justified their non-compliance with the Tribunal's Orders). And none of the measures we award as sanctions requires any additional action by the Tribunal.

7. We conclude that Claimants' motion for sanctions should be granted . We will award, as sanctions under AAA Commercial Rule R-58, a stay of proceedings on Respondents' counterclaims until such time as Respondents fully comply with our prior orders (the "Stay Sanction"), a prohibition of Respondents' further asserting claims or defenses based on the conduct of senior management of the Company up to the date of this Award, a requirement for lead counsel to be designated by Respondents and for such lead counsel to make all submissions on Respondents' behalf with undertakings equivalent to those imposed by Federal Rule of Civil Procedure 11, and a monetary award for fees of the Tribunal with interest.

8. The Stay Sanction is accompanied by a Procedural Order putting the stay into effect. The Stay Sanction is an enforceable award insofar as it excludes, with finality, conditions for the lifting of the stay other than those stated in this Award. The Stay Sanction is implemented in in the form of a Procedural Order, so that it is clear that the Tribunal retains power to Order the lifting of the stay and to determine if the conditions for lifting the stay are met.

Essential Procedural History

8. This controversy had its starting point, for the Tribunal's involvement, when the Tribunal was notified by Company counsel of facts involving the alleged mistreatment of the Company's CEO, Jorge Gaitán, and the COO, Carol Echeverría, during a sequence of interactions between them, on the one hand, and Respondent Jorge Hernández, on the other hand, that occurred in Guatemala at the offices of the Guatemala affiliate of DTH in September 2021. The Claimants subsequently contended that there had been a wrongful removal of Mr. Gaitán and Ms. Echeverría from their positions at the Company[1], and Claimants applied for interim relief to restore the *status quo ante*. After receiving extensive written evidence from the Parties and hearing oral testimony on October 22, 2021, the Tribunal entered an order granting Claimants' interim relief application on November 12, 2021 (the "November 12 Order"). In material part, the November 12 Order required that Mr. Gaitán and Ms. Echeverría be restored to all working conditions and terms and conditions of employment with DTH that were associated with the performance of their Company management roles as of March 19, 2021 (on which date, after this arbitration was underway but before this Tribunal was constituted, all Parties had signed a written agreement that Mr. Gaitán would continue as Company CEO).

9. What occurred thereafter in this proceeding has turned out to have been a multi-faceted effort by Respondents to present to this Tribunal and to the Company's Board a false narrative of misconduct and criminality by Mr. Gaitán and Ms. Echeverría. This effort included, as its most central feature, filing multiple criminal complaints in a court in Guatemala in December 2021 and January 2022. Those criminal filings relied on a false account of submissions made in this arbitration and a false description of the events in September 2021 at DTH's offices that culminated in the termination of employment of Mr. Gaitán and Ms. Echeverría. Respondents then presented those Guatemala criminal court matters to this Tribunal as a reason that Respondents could not comply with (and should not be required to comply with or sanctioned for not complying with) our orders to restore Mr. Gaitán's role to what it was at March 19,

[1] DTH is controlled by Jorge Hernández, who is the controlling person of Respondents Terra Towers Corp. and TBS Management S.A. (herein collectively "Terra"), the majority shareholders of the Company. DTH is bound contractually to perform services for the Company, including tower construction, through agreements that were signed concurrently with the Shareholders' Agreement in 2015. Per the contracts executed in 2015 in conjunction with the Shareholders' Agreement, the Company makes a monthly payment to DTH to cover the services DTH provides, and DTH performs services for the Company by having Mr. Gaitán and Ms. Echeverría serve as officers of the Company and through employees of DTH and its country-specific affiliates in the countries in which DTH operates.

2021. They also presented these false accounts to lawyers in jurisdictions where DTH operates, and to one law firm in the Untied States, to obtain legal memoranda that were presented to this Tribunal in support of Respondents' position. In effect, Respondents decided to collaterally attack the November 12 Order and refuse to comply with it on the basis of the pendency of those criminal complaints, while concealing from the Tribunal that the alleged factual basis for the criminal complaints consisted of allegations that the Tribunal had already rejected in the November 12 Order.

10. We recite now in detail the procedural history that ensued after the November 12 Order. We do so in part because a key complaint of alleged Tribunal bias as stated by Respondents' counsel during the evidentiary hearing on June 3, 2022 is that the Tribunal unfairly refused to hear their evidence of Mr. Gaitán's and Ms. Echeverría's alleged misconduct and criminality *in the procedural setting preferred by Respondents*, *i.e.* a motion addressed to the Tribunal to remove them from their Company management posts. [2]

11. Ten days after the November 12 Order, the Respondents submitted to the Tribunal in letter form a mo[tion] for an order removing Jorge Gaitán from Management of Continental Towers LATAM Holdings Limited (the "Company"), "due to criminal acts of malfeasance which have damaged the Company and DTH." That letter also stated: "Respondents are contemporaneously bringing the underlying facts to the attention of the Company's Board seeking as well the Board's approval for Gaitán's removal from management."

12. The Tribunal issued a Procedural Order the next day, November 23, 2021, that stated:

> The Tribunal has received Respondents' November 22, 2021 application (the "Application") for reconsideration and clarification of the Tribunal's November 12, 2021 Order Granting Interim Relief (the "Order") and for a stay of the effectiveness of the Order.
>
> The Application insofar as it seeks a stay is denied and decision is otherwise reserved. The November 24 deadline for compliance and reporting concerning compliance set forth in the Order remains in effect and we look forward to receiving the parties' submissions.

[2] It is not our role to evaluate our own impartiality, save as we are required by the AAA Commercial Rules and applicable ethical standards (e.g., AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes) to resign if we conclude we can no longer act impartially, and to make disclosures of facts that a reasonable observer might consider to affect our impartiality, which each of us has done.

> Compliance with the Order is not excused or postponed by this order or the Application.
>
> Any further submissions concerning the Application, insofar as decision has been reserved, shall be made only as directed by the Tribunal.

13. On November 30, 2021, Respondents sent to the Tribunal what they termed "the applicable DT review documents pertaining to Gaitán and Continental." This was an evidentiary submission to us of ostensibly new or newly-discovered purported facts said by Respondents to bear on Mr. Gaitán's fitness to maintain his position as Company CEO. No report was made of any Board action and no request for relief from the Tribunal was made.

14. In a separate letter on November 30, 2021, Respondents through counsel took issue with factual assertions made by Mr. Gaitán in a letter from the Company's counsel to the Tribunal dated November 23, 2021 that Mr. Gaitán had certified as truthful. Again, no relief to remove Mr. Gaitán was sought from the Tribunal. The letter reported that "[t]he A Shareholders [Terra Respondents] have requested a Board meeting with the B Shareholders [Peppertree Claimants[3]] to discuss these and several other related issues."

15. On December 3, 2021, Respondents' counsel notified the Tribunal "that Terra has called a board meeting for next Thursday, December 9, in order to address the issues that have been raised concerning Mr. Gaitán …."

16. On December 6, 2021, the Tribunal made a procedural order that covered a number of matters. Most pertinent here: (1) the Tribunal denied Respondents' motion to reconsider the November 12 Order (having before then reserved decision), and (2) directed that "[i]f Respondents wish to seek the removal of Mr. Gaitán from Management of the Company they shall submit a resolution to the Board for Board approval by December 13, 2021. If no such resolution is submitted by that date, the Respondents' application to the Tribunal for the removal of Mr. Gaitán will be deemed withdrawn." The latter direction was given having regard for the fact that, as noted in paragraphs 10 and 11 above, Respondents had informed the Tribunal of their plans to present the proposed removal of Mr. Gaitán as Company CEO to the Board, but had not applied to the Tribunal for the removal of Mr. Gaitán. Given the positions of the

[3] Claimants Telecom Business Solution LLC and Latam Towers LLC are controlled by a Cleveland,Ohio-based private equity firm, Peppertree Capital Management, Inc.

Parties, the Tribunal understood Respondents' reporting to us concerning the timing of their intended Board presentations as a notification that we could expect an application from Respondents for the removal of Mr. Gaitán as Company CEO in a short time.

17. On December 9, 2021 the Tribunal sent an email to the Parties that stated:

> In regard to compliance with the Tribunal's November 12, 2021 Interim Relief Order, the Tribunal does not propose to issue any additional ruling or relief without first hearing witness testimony concerning the facts set forth in the written submissions that have been made on the compliance issue. Should the Parties wish to have such a hearing, the Tribunal's only available business day before the Holiday Period, with reasonable notice, is Friday December 17. If there is to be such a hearing, we would expect to hear testimony from Mr. Gaitán and Mr. Hernández, and we would entertain in advance the Parties' submissions as to what other witnesses might testify.

18. On December 10, 2021, Respondents' counsel submitted a letter reporting that Terra had proposed the removal of Mr. Gaitán at a Board meeting the preceding day, that the Peppertree-appointed Directors did not support this, and that "[b]ased on the foregoing, Terra respectfully requests that the Tribunal consider and issue an order on Terra's motion to remove Mr. Gaitán."

19. Before the Tribunal responded to that request, however, Respondents' counsel sent another letter to the Tribunal dated December 13, 2021 "to provide the Tribunal with additional evidence from DTH's ongoing investigation of Mr. Gaitán…." (This letter was received by the Tribunal on December 14, 2021 at 1:07 a.m., a time-record referenced in the procedural order quoted in para. 20 below).

20. In a procedural order issued on December 15, 2021, the Tribunal stated in relevant part:

> If the portion of the 1:07 a.m. December 14 submission that relates to the proposed removal of Mr. Gaitán has not yet been presented to the Board, and Terra wishes to renew its effort to have the Board remove Mr. Gaitán on the basis of the facts set forth in this submission, Terra should do so. **When the Board has voted on this renewed proposal, the Tribunal should be notified, in a joint communication, only whether Terra's proposal was adopted or rejected. At that time, or upon request of Terra if Terra does not wish to renew its proposal to the Board, the Tribunal will inform the Parties what further written submissions, if any, will be permitted concerning the motion for removal of Mr. Gaitán.** In case Terra makes such a request to the Tribunal, it should be stated simply as a notification of the request for consideration of the motion, and should not contain argument or evidence.

(emphasis supplied).

21. Thus the record is clear that at the end of 2021, the Tribunal was not neglecting a request from Respondents for action on their request for removal of Mr. Gaitán on the basis of any preconceived notion that the proposed motion was not supported by facts. The Tribunal had clearly directed Respondents to return to the Board to have the Board reconsider the question in view of the new facts Respondents claimed to have uncovered (and for the Parties to report jointly on the outcome for Tribunal consideration of next steps).

22. On January 4, 2022, Respondents used the platform of an invited submission on a different issue to expand upon their contentions of malfeasance by Mr. Gaitán. But the letter did not contain any report that the question of removal of Mr. Gaitán had been re-submitted to the Board.

23. In the ensuing months we held proceedings on a motion by Claimants to compel compliance with the November 12 Order and to have sanctions issued for non-compliance. In the course of those proceedings, which culminated in our Order dated March 15, 2022, Respondents made further attacks on Mr. Gaitán and Ms. Echeverría. We were presented by Respondents with evidence, nearly all of it hearsay, that (1) Mr. Gaitán and Ms. Echeverría were defendants in a criminal proceeding in Guatemala resulting from their alleged misdeeds that allegedly victimized Respondent DTH, including theft of company proprietary data, (2) a Guatemala criminal court judge had allegedly made an interim measures order in the 2022 criminal complaint proceedings lodged by DTH against Mr. Gaitán and Ms. Echeverría on February 4, 2022, to freeze their bank accounts and restrict them from leaving Guatemala ("*ne exeat* order"), (3) a DTH internal investigation allegedly revealed that Mr. Gaitán had by malfeasance and misrepresentation created substantial financial liabilities for the Company toward a client; and (4) a DTH internal audit revealed a scheme of embezzlement led by Mr. Gaitán and his father (who had recently been discharged as a DTH employee after more than ten years of service). But Respondents did not report to the Tribunal that their motion to remove Mr. Gaitán was ripe for consideration by the Tribunal based on the satisfaction of the condition precedent to the possibility of Tribunal action on their motion to remove Mr. Gaitán – *i.e.* that there had been Board consideration of a resolution to remove him and that the Board had rejected the resolution.[4] (To be clear, the Tribunal did not state at any point that a Board deadlock on a resolution

[4] On January 28, 2022, Respondents submitted as evidence in opposition to Claimants' Motion to Compel Compliance with the November 12 Order, among other things, a witness statement of Jorge Hernández and a transcript of the Company Board meeting held December 9, 2021 (Ex. R-96). Mr. Hernández in his witness statement did not assert that the Peppertree Directors had voted against a resolution to remove Mr. Gaitán and that therefore removal of Mr. Gaitán was ripe for consideration by the Tribunal. Rather, he stated that the position of the Peppertree Board members concerning removal of Mr. Gaitán was that the Tribunal's November 12 Order deprived

presented by Respondents to remove or suspend Mr. Gaitán and/or Ms. Echeverría would be a **sufficient** condition for the Tribunal to entertain a motion by Respondents).

24. Respondents did make one more effort to have the Tribunal act on Respondents' requests with regard to Mr. Gaitán and Ms. Echeverría, that is to say, to have the Tribunal entertain their motion to remove him. That was on February 25, 2022, while the non-compliance/sanctions issue that we had spent the preceding two months addressing, culminating in the oral hearing on February 12, 2022, was *sub judice*. But this was not the joint report we had asked for as to whether the Board had acted on a previously presented resolution to remove Mr. Gaitán. (*See* Order quoted in para. 17 above). Rather, Respondents presented a proposed application for "emergent relief" to suspend Mr. Gaitán and Ms. Echeverría, for the duration of the pending purported criminal proceedings that DTH had lodged against them in Guatemala, on the alleged basis that their continued service to the Company while such "proceedings" [5] were pending posed compliance risks the Company should not accept.

25. Claimants replied on February 28, 2022, informing the Tribunal that the Board had not yet acted upon Respondents' proposal for such a suspension. Respondents presented an unsolicited Reply on March 2, 2022, purporting to contest factually the Claimants' assertions about Board action or inaction. On March 15, 2022 in Procedural Order No. 2022-02 the Tribunal acted on Respondents' application for leave to remove Mr. Gaitán and Ms. Echeverría, denying the application. The Tribunal stated: "[W]hereas the decision whether to terminate Company management from their positions resides with the Board of Directors under the Shareholders' Agreement, the proposed motion lacks merit and therefore the request for leave is not granted."

26. In that March 15, 2022 Order (PO 2022-02), the Tribunal -- without deciding the disputed factual issue of whether the Board had or had not rejected a Terra resolution to suspend (not remove) Mr. Gaitán and

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them of their power to vote to remove Mr.Gaitán. (Hernández Witness Statement 1/28/22 at para. 18). He also stated, and the transcript supported, the position that Respondents' proposal at the December 9, 2021 Board meeting had been in the alternative: to remove Mr. Gaitán or to arrange the basis for his compensation in his Company role. The thrust of Mr. Hernández's witness statement is that Respondents had tried and not succeeded to negotiate with Claimants an agreement on Company-role compensation for Mr. Gaitan and Ms. Echeverria.(Id. at paras. 19-23).

[5] We use the phrase "purported criminal proceedings" because the DTH criminal complaints filed in Guatemala can be considered equivalent to a notification made to a prosecutor's office in the United States by an alleged victim asking for the prosecutor to open an investigation.

Ms. Echeverría based on alleged corrupt-practices laws compliance risks, and without deciding whether indefinite suspension of Mr. Gaitán and Ms. Echeverría was a materially different issue from their removal -- determined that we lacked power to substitute our judgment for that of the Board and to impose the Terra-appointed Directors' version of the correct outcome. The essential basis of that ruling was that the Shareholders' Agreement grants the Board the power to hire and fire the Executive Team of the Company and requires a majority vote of the directors to make any such decisions. That position was also an essential premise of our November 12 Order. It had nothing to do with any premature rejection of Respondents' evidence. That ruling left Respondents free to seek leave to make claims against Claimants on a theory of breach of fiduciary duty on the basis of the alleged actions of the Peppertree-appointed Directors of the Company in rejecting removal or suspension of Mr. Gaitán and Ms. Echeverría. They have not sought to do that.

27. So that the procedural trajectory that led us to this Award will be clearly understood, we address here a separate March 15, 2022 Order (Procedural Order 2022-01) not yet discussed. When Claimants began the process of seeking sanctions for non-compliance with the November 12 Order in January 2022, they submitted as evidence of non-compliance certain publications that had been made by DTH affiliates in news media in Costa Rica, Panama and Guatemala declaring, and addressed expressly to DTH's clients and the public, their complete disassociation from Mr. Gaitán and Ms. Echeverría. These publications had been made on or about January 10, 2022. (As will be seen later on in this Award, it turns out that the timing of those publications coincided with the filing by DTH of a criminal complaint in Guatemala on January 13, 2022, that, in its amended form dated January 20, 2022, named as defendants Mr. Gaitán, Ms. Echeverría, and two other DTH employees who allegedly criminally conspired with them). The sanction that we imposed for non-compliance with the November 12, 2021 Order, in this March 15, 2022 Order (PO 2022-01), was to require DTH to cause its affiliates to publish corrective and curative notices in the same media in which the January 10 DTH publications relating to Mr. Gaitán's and Ms. Echeverría had appeared. We stated in pertinent part:

> Respondent DTH shall cause its subsidiaries in Guatemala, Costa Rica, and Panama, as identified above … to publish forthwith, in the same media in which the notices were published, on the same corporate letterhead, and in the same language(s), font sizes and styles as the notices, the following:
>
> **IMPORTANT NOTICE TO OUR CLIENTS, CONTRACTORS AND SUPPLIERS IN THE TELECOMMUNICATIONS INDUSTRY**
>
> **[Corporate identifying information identical to that of the January 10 notice] hereby withdraws its notice dated January 10, 2022 concerning Mr. Jorge Alberto Gaitán Castro**

> **and Ms. Carol Odette Echeverría Carbrera [sic][6] de Reyes consistent with orders of an international arbitral tribunal dated November 12, 2021 and March 15, 2022 that are binding upon DTH Holdings, Inc., the parent company of [the corporate entity]. We reaffirm the ongoing roles of Mr. Gaitán Castro and Ms. Echeverría Cabrera de Reyes in our company as fully authorized executive management of our affiliate Continental Latam Holdings Limited.**

In PO 2022-01 we ordered Respondents to submit proof of compliance within ten business days.

28. On the deadline for compliance/compliance-reporting by Respondents, March 30, 2022, the Tribunal received a letter from counsel to DTH and Jorge Hernández, Allan Joseph, in which he stated that "**there was no such 'proof of compliance to submit**" because there had been no compliance. As justifications for non-compliance, Mr. Joseph's letter asserted that the Tribunal lacked jurisdiction to order the publication of the corrective notice, and, further, that "**DTH cannot comply with the Tribunal's directives in the Order because it requires the respective local subsidiaries of DTH to act contrary to local laws and local corporate governance standards.**" Mr. Joseph's letter continued: "**<u>The local DTH entities cannot publish a notice indicating that Jorge A. Gaitán and Carol Echeverría have 'ongoing roles' in our company when these individuals … are under indictment for criminal acts which potentially place each local subsidiary in violation of local laws.</u>**" (emphases supplied). In support of the latter position, Respondents submitted three written statements from lawyers in various countries where DTH had affiliates, and five management letters from the management of those DTH affiliates purporting to take positions in reliance on the lawyers' statements, each purporting to opine that the continued engagement by the Company of Mr. Gaitán and Ms. Echeverría presented an unacceptable compliance risk in view of the criminal allegations (by DTH) against them and the other evidence of misconduct allegedly uncovered by Respondents. They also presented a Memorandum dated February 16, 2022 issued by the American law firm Morrison & Foerster (hereinafter, the "Morrison Memorandum"), which purported to advise the Company that it was inappropriate to keep Mr. Gaitán in the role of Chief Compliance Officer for the Company while the criminal proceedings against him were ongoing. We discuss the Morrison Memorandum later in this Award.

29. As we explain in this Award, the position advanced by Mr. Joseph as counsel to DTH and Mr. Hernández (and which was joined by the other Respondents) turns out to have been insupportable due

[6] "[Sic]" connotes that there was a spelling error in the Tribunal's March 15, 2022 Order. Carbrera should be Cabrera.

to the falsity of the alleged facts on which the various legal/compliance opinions and management letter were based and on which the legal position asserted by Mr. Joseph in that March 30, 2022 letter was grounded.

30. When the deadline for compliance with the March 15 order PO-2022-01 arrived, and Respondents had not published the corrective notices, but instead had offered the reasons for non-compliance just described, Claimants again moved for sanctions. At that point, and before scheduling Respondents' submissions concerning the new sanctions motion, the Tribunal decided to consider whether there should be a full evidentiary hearing to determine the facts concerning alleged misconduct and criminality of Mr. Gaitán and Ms. Echeverría.

31. Before setting a schedule for Respondents to reply in writing to that sanctions motion, the Tribunal called for a status conference, which was held on April 12, 2022. The Tribunal discussed the prospect of such an evidentiary hearing with the Parties at the conference, after having solicited their views by a written questionnaire.

32. Following that conference the Tribunal issued Procedural Order No. 2022-06 on April 26, 2022 that made the following key points as relevant here:

1) "The Tribunal has determined, with respect to non-compliance with our March 15 Order, to defer the consideration of any possible sanction, or identifying potential sanctions for comment under Rule R-58[7], until an evidentiary hearing has been held on an accelerated basis to consider and evaluate Respondents' evidence of misconduct on the part of Mr. Gaitán and Ms. Echeverría and certain persons

[7] Notwithstanding this reference to Rule R-58 in Procedural Order No. 2022-06, after careful consideration, we have determined that Rule 58(b) of the AAA Commercial Rules does not require a separate "opportunity to respond" prior to an Award on sanctions, wherein Respondents would comment specifically on the sanctions that the Tribunal intends to impose. The sensible construction of Rule 58(b) is that the Respondents should have the opportunity to make submissions on whether the imposition of sanctions is justified. This interpretation follows from Rule 58(a) which authorizes the Tribunal to impose "appropriate sanctions". If Rule 58(b) mandated a separate comment phase on the question of whether a particular contemplated sanction is an "appropriate sanction," the Rule would so state. Moreover, Rule 58(a) deals specifically with how a Tribunal must proceed in the case of a particular type of sanction, i.e. one that "limits a party's participation in the arbitration or results in an adverse determination of an issue." In that event, the Rule does not direct a comment opportunity concerning the specific sanction, but does require that the arbitrator "shall explain that order in writing and shall require the submission of evidence and legal argument prior to making of an award." We have complied with Rule 58(a) with regard to each of the sanctions imposed in this award.

who are claimed to have acted in concert with them, including Mr. Gaitán's father. Such allegations of misconduct appear to be the primary basis for Respondents' refusal to comply with the corrective disclosure mandated in the March 15 Order."

2) the Tribunal reserved hearing dates in May and early June and invited comments from the Parties concerning what witnesses should give oral testimony and what if any additional documentary evidence should be provided before the hearing.

3) Respondents were invited to submit comments in writing concerning the legal basis for their non-compliance with the March 15 Order and to respond in other respects to Claimants' motion for sanctions.

33. On April 29, 2022, Company counsel notified the Tribunal that Mr. Gaitán and Ms. Echeverría would be available to testify. Also on that date, Claimants provided dates of availability, and in a written submission provided comments on proposed witnesses and proposed additional documentary evidence to be provided by Respondents.

34. Respondents also submitted written comments on April 29, 2022, making the following assertions:

1) "The Tribunal lacks jurisdiction to order any action be taken by non-parties to this arbitration especially where those non-parties are parties to agreements with Company subsidiaries which provide for separate arbitration provisions."

2) "[T]he March 15 Order is a partial award and is part of the vacatur motion currently pending before the Southern District of New York, leaving this Tribunal functus officio."

3) "Respondents refusal to comply with the March 15 Order has nothing to do with Mr. Gaitán's and Ms. Echeverría's misconduct and there is no need to take evidence in that regard." This directly contradicted the position taken by Mr. Joseph in his letter to the Tribunal on March 30, 2022 (quoted above in Paragraph 28) In a footnote, the Respondents contended that the Tribunal's unwillingness to entertain Respondents' motion to remove Mr. Gaitán and Ms. Echeverría from their Company positions was product of "*the Tribunal's evident partiality and bias*[8]."

[8] In the April 29, 2022 submission, Respondents' accusation of Tribunal bias was linked by Respondents to the Tribunal's invitation to the Parties, made in Procedural Order No. 2022-06 on April 26, 2022, for comment on whether the Tribunal might direct the replacement of the Company CFO Mr. Quisquinay as a sanction for Respondents' violation of the Tribunal's December 8, 2021 Order. That December 8 Order had directed Respondents

35. The Tribunal considered Respondents' assertion that their "*refusal to comply with the March 15 Order had nothing to do with Mr. Gaitán's and Ms. Echeverría's misconduct.*" In electing to proceed with the announced evidentiary hearing, we also concluded that (1) only if the Respondents' factual contentions about Mr. Gaitán and Ms. Echeverría were truthful could there be any excuse -- that would result in denial of sanctions or mitigate the severity of sanctions -- for Respondents' total disregard of the Tribunal's orders of November 12, 2021, December 8, 2021, and March 15, 2022, (2) therefore hearing the evidence and giving both sides a procedurally fair chance to present evidence was a necessary foundation for our judgment about imposing any further sanction and if so the severity of the sanction to be imposed, and (3) in all events, the Claimants in their April 29, 2022 comments submission approved of the Tribunal's proposal to hold a hearing. Indeed Claimants sought the opportunity to show in a full evidentiary hearing that the Respondents' allegations of misconduct against Mr Gaitán and Ms Echeverría were baseless. They

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to take all steps necessary to ensure that the Company paid the legal bills of Company counsel. It suffices to state that the Tribunal (1) has not removed Mr. Quisquinay from his position, and (2) another solution was ordered to address the dispute over Mr. Quisquinay's refusal to pay the fees of Company counsel in PO 2022-04.

A few days later, we learned from Claimants that Respondents had presented to Claimants an allegation (allegedly not their own, but that of an anonymous "whistleblower" in mid-March 2022) that Goldman Sachs, the indirect parent entity of Claimant AMLQ, had paid a $250,000 bribe to the Chair of the Tribunal on the eve of his appointment confirmation in June 2021. This allegation appeared on an internet site and turns out to have been the second of two articles on obscure websites relating to this case and purporting to be based on a "whistleblower" report. The other, first published February 25, 2022, and said to be based on information from a whistleblower who was a former employee of Peppertree, was entitled "Peppertree Caught Up in Corruption Scandal, Whistleblower Alleges," and concerned the same ostensible FCPA compliance concerns raised by Mr. Gaitán's continued service as FCPA compliance officer that were covered in the Morrison Memorandum (see paragraphs 90 et seq. of this Award). (PPT-AMLQ Ex. 83).

As to the Goldman Sachs "whistleblower" bribery report concerning the Tribunal Chair, correspondence provided by AMLQ's counsel showed that Goldman Sachs upon investigation had determined that the allegation was baseless. The Tribunal thereafter provided to the Parties a separate refutation based on information provided by the Chair. Then Respondents asked the Tribunal to investigate, *inter alia* by issuing arbitral subpoenas to Goldman Sachs. They supported the application with executed affidavits made by forensic investigators hired by Respondents, captioned in the Southern District of New York case concerning PFA-1 but evidently not filed. The Tribunal declined to embark on the proposed investigation. Respondents have not asked the Chair to withdraw. We do not know if Respondents asked ICDR to disqualify the Chair, but if any such request was made it has not been granted. The Chair and the Tribunal considered but rejected the possibility of resignation. If the unease naturally felt in response to such allegations or the post-refutation request to investigate them could justify unseating one or all members of a sitting tribunal, some parties in arbitrations would be inclined to commit provocative acts to bring this about, and the institution of arbitration would be compromised. See William W. Park, *Arbitrator Bias*, TRANSNATIONAL DISPUTE MANAGEMENT (TDM), January 2015, www.transnational-dispute-management.com (last visited Aug. 5, 2022): "To promote the litigants' trust in the arbitral process, an arbitrator might sometimes step down just to alleviate one side's discomfort. Not always, however. In some instances it would be wrong to permit proceedings to be disrupted by unreasonable fears, whether real or feigned."

presented a list of proposed witnesses consisting of persons associated with written evidence the Respondents had presented. And they submitted proposed requests for production of documents including categories of documents that Claimants had sought for review by the Peppertree-appointed members of the Company's Board in connection with the Terra-appointed Directors' proposals for removal or indefinite suspension of Mr Gaitán and Ms Echeverría from Company management.

36. Accordingly, on May 4, 2022, the Tribunal entered Procedural Order No. 2022-07. (This Order was re-issued in a slightly amended form on May 5). We ordered Respondents to produce 11 categories of documents on or before May 12, 2022. We also ordered Respondents to cause seven witnesses to appear to give testimony. We ordered the Company to cause two witnesses to appear to give testimony: Mr. Gaitán and Ms. Echeverría. We directed the Parties to coordinate with one another on a schedule for the appearances of the witnesses. We also declared the Tribunal's intention to issue an arbitral subpoena to the Morrison & Foerster law firm ("Morrison"), whose Memorandum dated February 16, 2022 had been entered as evidence by the Respondents. We annexed to our Order a draft of the subpoena, which had been carefully drawn to minimize privilege implications, and invited comments from the Parties by May 5. Respondents did not offer any comments. Thereafter the subpoena was issued and service was accepted by Morrison.

37. On May 11, 2022, Claimants submitted to the Tribunal an email message their counsel had received from Terra's counsel on that date, which stated: "*Respondents will not be producing any witnesses for the upcoming evidentiary hearings. We have made our position abundantly clear that this Tribunal is functus officio. We also deny that 'all these witnesses are under our control.' They are not. We will file a specific response by tomorrow's deadline with specific objections but for purposes of scheduling we are not producing any witnesses. Counsel for DT Holdings, Inc. joins in taking this position.*" (emphasis supplied). On May 16, 2022, Respondents in an email to the Tribunal from Mr. Joseph confirmed that "[c]onsistent with Respondent's objections, counsel for Respondents will appear remotely *as observers*." (emphasis supplied).

38. On May 12, 2022, the Tribunal received an email from DTH/Mr. Hernández counsel Mr. Joseph stating various objections to the Morrison subpoena and indicating that a formal objection was being prepared (notwithstanding Respondents' failure to submit any response to the draft of the subpoena the Tribunal provided to the Parties for comments before it was served). Later that day DTH's objection to the Morrison subpoena and motion to quash in letter form were received from DTH's counsel. After receiving

comments from Claimants' counsel, the Tribunal denied the objection/motion to quash in Procedural Order No. 2022-09 dated May 15, 2022. That Order rejected Respondents' contention that the Tribunal was *functus officio* and incorporated the reasoning of the Tribunal on the Respondents' *functus officio* objection that had been presented in Procedural Order No. 2022-08 on May 9, 2022. [9]

39. Also on May 12, 2022, Respondents submitted comments on PO 2022-07 asserting *inter alia* that the Tribunal lacked power to conduct the hearing, that the Tribunal was *functus officio*, that the Tribunal was biased against Respondents, that the Tribunal lacked power to direct Respondents to produce evidence, and that compliance with certain of the Tribunal's requests for evidence would be illegal under laws of Guatemala and El Salvador.

40. That May 12 submission was not in the form of a motion for relief: Respondents did not ask the Tribunal to vacate PO 2022-06 or PO 2022-07. And to our knowledge Respondents did not make an application in any judicial forum to enjoin this aspect of the arbitration. We address the contentions in that submission here:

1) The Respondents' assertion that the Tribunal was biased against Respondents served no purpose, because this arbitral tribunal has no power to adjudicate issues about its own impartiality or independence. Respondents could challenge one or more Tribunal members for alleged improper bias before the ICDR, or challenge an award of the Tribunal in court on the basis of "evident partiality." Raising this accusation could not serve as a basis for the Tribunal to excuse compliance with its own order to produce evidence at and prior to a hearing.

2) The Tribunal's reasoned rejection of Respondents' *functus officio* position was set forth in PO 2022-08 and PO 2022-09. In PO 2022-08, on May 9, 2022, we addressed Respondents' contention that our December 8, 2021 Order concerning the Company's payment of fees of the Company's counsel, although identified by this Tribunal as an "order," was actually an "award" and that we were therefore powerless to address allegations in 2022 that Respondents were directing the Company CFO (also employed by DTH) to fail to make those payments. We found that, apart from our own characterization, under the most persuasive federal case law[10], our December 8 Order concerned a matter of procedure in

[9] PO 2022-08 concerned Respondents' non-compliance with our December 8, 2021 Order that directed them to facilitate, and not obstruct, the Company's payment of counsel fees of Company counsel in the arbitration.

[10] PO 2022-08 cited and discussed, most prominently, *Publicis Communication v. True North Communications Inc.*, 206 F.3d 725 (7th Cir. 2000). We also discussed Second Circuit cases that had been cited by Respondents that permit treating an interlocutory decision of an arbitral tribunal as an Award when it resolves a separate and independent

the arbitration – the right of the Company to the continued service of its counsel – and did not constitute any part, much less a substantial part, of the merits or any separate and independent claim. We also examined Respondents' *functus officio* position in PO 2022-09 on May 15, 2022, after Respondents objected to our issuance of an arbitral subpoena in connection with the issues decided in this Award, on the basis that our November 12 interim relief order, also identified by us as an "order," was also actually an "award," leaving us without power to address any further the question of whether there had been compliance with the November 12 Order. There we stated in pertinent part: "No party has asserted a merits claim concerning the status of Mr. Gaitán and Ms. Echeverría. These issues are collateral to the still unresolved merits claims, including claims by Claimants for damages allegedly caused by misappropriation of Company funds by DTH."

3) Respondents evidently did not obtain a judicial order to enjoin the proceedings on the basis that we are *functus officio*, and so, in proceedings before this Tribunal, they remain bound to comply with the Tribunal's orders concerning these proceedings or risk the consequences of non-compliance under the AAA Commercial Rules. Respondents made the decision to limit their participation in the June 3 and July 22 evidentiary hearings to the self-described status of "observers." While we did not accept the legitimacy of their reasons for imposing that limitation on their participation, we accommodated their attendance in the proceedings because as Parties they had every right to attend. And we permitted Respondents at every step to change their position and participate fully, which they elected not to do.

4) Respondents' assertion that the Tribunal lacked power under the AAA Commercial Rules to direct production of documents or the appearance of witnesses at a hearing was also without merit. See AAA Commercial Rules R-34(a) ("The parties … shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute"). That Rule applies to all issues, procedural or substantive, final or interlocutory, that a Tribunal is called upon to determine.

5) Respondents' contentions that the Tribunal directed them to provide for the appearance of witnesses that they did not control were contrary to the record. Those witnesses were either in the employ of Respondents or were professionals engaged by Respondents to produce evidence for use in the arbitration.

6) One instance of such control pertains to an opinion of a Guatemala lawyer delivered by hand to Terra internal counsel Danielle Kirby on May 12, 2022 and delivered onward to the Tribunal by Respondents' counsel on that date. (Ex. R-131). The author of the opinion, like Ms. Kirby, is among the

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claim. *See, e.g.,* *Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.3d 280, 283 (2d Cir. 1986); *Sperry Int'l Trade, Inc. v. Gov't of Israel*, 532 F. Supp. 901, 906 (S.D.N.Y.), *aff'd*, 689 F.2d 301 (2d Cir. 1982).

witnesses whose testimonial appearance the Tribunal directed and who Respondents contend is not in their control. This Guatemala lawyer, Mario Roberto Méndez Álvarez, was listed as a witness in PO 2022-07 because Respondents submitted as evidence a purported record of a criminal proceedings hearing in Guatemala on February 4, 2022 in which Mr. Méndez appeared as counsel for the DTH affiliate that was the criminal complainant. He is a witness within the control of Respondents by the legal standards we apply.[11] His failure to appear to testify not only violates our Order but results in our giving no weight as evidence to his May 12 Opinion.[12]

7) In any event, this May 12 Opinion authored by Mr. Méndez Álvarez would furnish no excuse for Respondents' non-compliance with our Order for their production of evidence of criminal conduct by Mr. Gaitán that was presented to the Guatemala court. The "jurisdiction" objection that the Tribunal cannot require production of evidence in possession of DTH affiliates is not only akin to the jurisdictional objections with respect to those affiliates that we have rejected multiple times, but is contradicted by an undisputed evidentiary record in this case that a single individual, Jorge Hernández, controls DTH and each of its individual-country DTH affiliates and therefore an order to DTH to produce evidence is not invalid because a DTH affiliate has possession of the evidence. (We observe that our treatment of the jurisdictional issue included specific analysis of portions of the relevant agreements of the Parties in which it was evident that DTH had entered into the agreement as agent for its affiliates and not merely as a principal, such that the affiliates, contrary to Respondents' arguments, are in fact Parties to those agreements. It was also an element of our analysis that our orders directed compliance by DTH, not its

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[11] Under New York law (which does not *govern* on this issue but is a suitable point of reference), "'[c]ontrol' is used in a very broad sense and includes a witness under the party's influence or one whom it may be naturally inferred is of good will to the party." Kupfer v. Dalton, 169 A.D.2d 819, 820 (2d Dep't 1991).

[12] The AAA Commercial Rules provide the Tribunal with guidance in this context. Rule R-23 provides in relevant part that "[t]he arbitrator shall have the authority to achieve a fair, efficient and economical resolution of the case, including without limitation…(d) in the case of willful non-compliance with any order issued by the arbitrator(s), drawing adverse inferences [and] excluding evidence and other submissions." Further, paragraph 53 of Procedural Order No. 2 states in relevant part that "[t]he unexcused failure of a witness to appear for cross-examination shall be a proper basis for exclusion of the Witness Statement."

Also, paragraph 11 of Procedural Order No. 2 expressed the intent of the Tribunal to be guided (but not bound) by the ICDR Guidelines for Arbitrators Concerning Exchanges of Information ("ICDR Guidelines") and the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules"). Guideline 8b. of the IBA Guidelines states: "In the event any party fails to comply with an order for information exchange, the Tribunal may draw adverse inferences and may take such failure into account in allocating costs." Article 9(6) of the IBA Rules states in relevant part: "[i]f a party fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party." Article 9(7) of the IBA Rules states in relevant part that "[i]f a Party fails without satisfactory explanation … to make available any evidence, including testimony, ordered by the Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party."

affiliates, and that DTH has not at any time shown that it lacks the ability to direct the conduct of its affiliates).

8) We reject on its merits Mr. Méndez Álvarez's completely conclusory opinion that "*it would also be totally illegal to give [the Tribunal] evidence that is part of a criminal proceeding and in the possession of the attorney general's office, for criminal acts committed within the national territory that are unrelated to the specified arbitration.*" (emphasis supplied). For one thing, it is simply false that the alleged criminal acts are "unrelated to the specified arbitration." Now that we have the Guatemala amended criminal complaint filed for DTH on January 20, 2022 by Mr. Méndez Álvarez as DTH's counsel, we know that the allegations of Mr. Gaitán's and Ms. Echeverría's criminality advanced by Mr. Méndez Álvarez is mostly a re-hash of Mr. Hernández's version of the meetings in DTH's Guatemala offices on September 27-28, 2021 -- facts that formed the core factual matrix of our interim relief proceedings in October 2021, and that led to the November 12 Order.

9) Moreover, to show a genuine issue of illegality under Guatemala law that should cause our Tribunal as a matter of discretion to modify its order for production, we would need to know specifically how the witness would be exposed to adverse legal consequences in Guatemala if he or she complied with our Order. Further, Terra and DTH, the Respondent entities to which our production orders were directed, are Panama and British Virgin Islands entities, and Jorge Hernández is a resident of California. How compliance with our production orders would expose them to adverse legal consequences in Guatemala is not shown. To be clear, this opinion from Mr. Méndez Álvarez purports to opine not on the purported effect of Guatemala law on himself as a Guatemala citizen, but on the alleged illegality under Guatemala law for "Terra and/or DTH to submit information" about the Guatemala criminal complaints made by DTH affiliates against Mr. Gaitán, Ms Echeverría and certain of their former DTH colleagues. His two-sentence "opinion," citing no legal authority, fails to raise any genuine issue about illegality of compliance with our production order.

10) Respondents also submitted on May 12, 2022, a written statement by a person who identifies as Luis Edgar Morales Joya, a criminal attorney in El Salvador. The statement is partly that of a fact witness and partly purports to be an opinion on El Salvador law. (Ex. R-132). Mr. Morales states: "*I am filing criminal and civil action [against] Jorge Leonel Gaitán Paredes* [Mr. Gaitán's father] *and another, for the crimes of Management Fraud and Falsification or Alteration of Documents.*" (emphasis supplied). He did not provide a copy of either a criminal complaint or a civil complaint or any other record of the accomplished filing of such a case. Therefore we understand Mr. Morales' statement to be that as of May 12 he was preparing to file but had not filed such actions against Mr. Gaitán's father. Mr. Morales then

asserts, in regard to our order for production of evidence of misconduct by Mr. Gaitán's father, that "*decisions rendered by a foreign authority are not subject to compulsory compliance in the Republic of El Salvador until they have first fulfilled the Procedure of Formalities for Authorization of Enforcement of Judgments Rendered by Foreign Courts.*" (emphasis supplied). We read Mr. Morales's assertion of El Salvador law to refer only to steps that must be taken to have the courts in El Salvador enforce a foreign authority's document production order, but this has no bearing on Respondents' lawful obligation to comply voluntarily with this Tribunal's requests for production of evidence. Moreover, the law of El Salvador appears to be quite beside the point because our Order directs Panama and BVI entities and a California resident, all of whom agreed to arbitrate disputes before an AAA Arbitral Tribunal in New York, to produce such evidence in New York. Mr. Morales's opinion — apart from not identifying, much less supplying, the El Salvador laws he relies on — does not address the question of why El Salvador law furnishes an obstacle to their compliance with our order or exposes them to any adverse consequence in El Salvador if they complied.

11) These vulnerabilities of the May 12 legal opinions of Mr. Méndez Álvarez and Mr. Morales that Respondents' counsel tendered as evidence would or should have been apparent to Respondents' counsel, and yet in their May 12 submission to which these opinions were appended, they made no effort to explain why, in the framework of this arbitration and the AAA Rules and US/New York arbitration law, the contentions of these non-independent El Salvador and Guatemala lawyers (who were already engaged by DTH to bring criminal complaints against Mr. Gaitán and his father) should be afforded any meaningful weight. They simply stated in a conclusory way, citing those opinions, that our orders for production violated evidentiary privileges under foreign law. (Respondents' May 12, 2022 submission at p. 7).

12) The submission of these legal opinions as justification for refusal to comply with our PO 2022-07 requiring the Respondents to provide evidence illustrates the lack of any support for Respondents' position. 41. In stating their "objection" to the June 3 hearing, and to explain their refusal to provide any of the documents or witnesses they were directed to provide and to limit their participation to being "observers," Respondents' counsel told the Tribunal they would be "***happy to***" provide evidence if we were considering their motion to remove Mr. Gaitán (Tr. 06/03 at 27:8), but that our decision instead to order the same evidence to be considered in the context of a motion by Claimants seeking sanctions against Respondents for having disobeyed Tribunal orders was somehow prejudicial/unacceptable. This position has no merit.[13]

[13] Respondents during the June 3 hearing again based their refusal to present evidence in the hearing on the fact that the Tribunal had declined to hear and decide their motion to remove Ms. Gaitán and Ms. Echeverría from

SUMMARY OF THE TESTIMONY GIVEN AT THE JUNE 3 HEARING

Mr. Jorge Gaitán

42. Now summarized is the oral testimony of Mr. Gaitán at the June 3 hearing. The Respondents, on the stated basis of their objections to the proceedings, and based on their self-imposed "observer" status, declined to cross-examine. Respondents' counsel were present (on Zoom, having elected, as was their right, not to attend in person) throughout Mr. Gaitán's testimony.

Non-Compliance of Respondents with November 12 Order

43. Mr. Gaitán's undisputed testimony was that his working conditions at DTH associated with his role as CEO of the Company as of March 19, 2021 were never restored and that in fact his ability to function as CEO of the Company has deteriorated not improved since the issuance of our November 12, 2021 Interim Relief Order. He testified:

> [T]hey never restored the same conditions of March 19, 2021, which was the day that the tribunal ordered to restore, or even the people who used to work at that moment are not the same in the same roles.[14] For example, Ms. [Pineda] never ha[d] any relations with

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Company Management. In that context, it is useful to quote what we said about that matter in PO 2022-09: "Respondents in several submissions have complained that the Tribunal has refused to entertain their proposed motion …That proposal has not been presented as a merits claim, nor as an application for an interim measure under AAA Commercial Rule R-37. The Shareholders' Agreement confers power to select Company Management on the Board of Directors. A Board deadlock on a proposal to change Company Management is, under the Shareholders' Agreement, a rejection of the proposed change."

We also note that before unveiling their so-called "functus officio" objection, and even thereafter (as shown in Paragraph 41 above), Respondents repeatedly importuned the Tribunal to reverse course about Mr. Gaitán - to reconsider the factual basis of the November 12 Order, to reconsider that Order based on new evidence of alleged malfeasance, and separately to act on a "motion to remove" Mr. Gaitán based on such alleged malfeasance.

[14] The Tribunal's November 12, 2021 Interim Relief Order stated in pertinent part:

> We therefore grant interim relief in the form of an injunction requiring that DTH immediately restore Jorge Gaitán and Carol Echeverría to the Company positions they occupied as of March 19, 2021, and that Respondents Terra and TBS take all necessary steps to cause DTH to comply with this Order. Further, we find that it is necessary – in order to avoid dilution of this relief through DTH potentially imposing working conditions that could amount to a constructive discharge, and in view of the practical inability of the Tribunal or the Claimants to monitor the day to day

> our operations in Central America. And all the level of harassment against us to forbid us to go back to the office has been increasing since then. It never stops. So there is no real capacity at this moment to run the company in the way that we just used to do it one year ago.

(Tr. 06/03 at 202:13-24).

OFG Project in Panama

44. With respect to the OFG project in Panama, Mr. Gaitán testified that the accusations against him by Respondents that he had violated duties as CEO of the Company by creating unauthorized liabilities of the Company toward a third party (OFG) and fraudulently representing himself to be "attorney-in-fact" for the Company[15], were without any merit. Mr. Gaitán testified to the following key points: (1) Respondents' accusation in submissions to the Tribunal that the OFG project in Panama was not disclosed to the Company's shareholders or the Board of Directors or the Development committee is false; (b) Respondents caused an English translation of a document concerning the Project to be made for the Tribunal that fundamentally changed its meaning to be inculpatory of Mr. Gaitán whereas the Spanish language document clearly showed that Mr. Gaitán had not engaged in any misconduct, (c) Mr. Hernández had full contemporaneous knowledge of the OFG project, (d) the legal representative of OFG, Mr. Jonny Reboso, confirmed to the Company in writing at Mr. Gaitán's request that no liability of the Company toward OFG existed and that "all the obligations for the developing of those 14 sites ha[d] been made by

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> operations of the Company as conducted within the framework of DTH – to (i) order the restoration forthwith of all working conditions and terms and conditions of employment by DTH that were associated with Mr. Gaitán and Ms. Echeverría holding the Company positions they held on March 19, 2021….

[15] On November 22, 2021, the deadline set by the Tribunal for Respondents to report their compliance with the November 12 Order, Respondents instead introduced exhibits related to their assertion that Mr. Gaitán had allegedly engaged in such misconduct. One such exhibit was an undated letter to Mr. Gaitán from the human resources manager of a DTH affiliate (Ex. R-76) – but clearly in the Fall of 2021 based on its text -- which stated in part: ""[Y]ou have claimed positions and roles that have not been assigned to you, as in the case of Proyecto OFG Panama, where you signed a Letter of Understanding as "Legal Representative" of Continental – a position or role you do not have – and as CEO of "DT" – also a position you do not hold. Furthermore you have made certain negotiations (Proyecto Tikal and Proyecto OFG Panama) without having authorization to do so, and which are undergoing analysis to determine if that involved losses for the Company's clients." But as discussed below in subparagraph (d), this accusation is far-fetched.

On November 30, 2021, Continental's counsel submitted to the Tribunal a letter from Mr. Gaitán to Continental's Board of Directors on that date, accompanied by a series of exhibits, responding to the accusations against him in regard to the OFG Panama Project. Respondents made further submissions in reply.

The Tribunal's conclusion that Respondents' accusations are without merit is supported not only by Mr. Gaitán's unchallenged testimony on June 3, 2022, but also by the weight of the credible evidence submitted to the Tribunal in 2021 and 2022, and by the adverse consequences resulting from the Respondents' refusal to comply with our order to provide oral witness testimony by Jorge Hernández about this matter (*i.e.* assignment of no weight to Mr. Hernández's witness statement assertions about the matter, and adverse inferences).

DTH and the local [DTH] entity in Panama. So there is no liability, not even for one dollar, for Continental Towers." (Tr. 06/03 at 205:24-206:2, 206:8-209:18), and (e) Respondents' accusation that Mr. Gaitán committed a fraud when the signed a letter to OFG in the capacity of attorney-in-fact for Continental Towers is without merit, as he had no intent to commit any fraud as evidenced by the fact that this letter was contemporaneously shared with the shareholders of Continental Towers (Tr. 06/03 at 210:15-213:24). (*See also* letter of Nov. 30, 2021 to the Board, which was forwarded to the Tribunal)

Authority to Engage the Company's Arbitration Counsel

45. With regard to Respondents' allegations that Mr. Gaitán lacked authority to engage Mr. Schachter's law firm (and another firm having international arbitration expertise) as Company counsel for the arbitration because Mr. Gaitán was not the CEO of the Company and Mr. Quisquinay was the only true member of the executive team of the Company, Mr. Gaitán refuted these allegations by his testimony that they were totally false. (Tr. 06/03 at 221:3-17). [16]

Role of Jorge Hernández

46. Mr. Gaitán testified that Jorge Hernández is orchestrating all the accusations against Mr. Gaitán. "It's not the A shareholder. We can put a name on this. Mr. Jorge Alberto Francisco Hernández is this, because he's behind every single action that any lawyer, employee, or entity on behalf of the A shareholder made." (Tr. 06/03 at 224:24-225:3).

Initial Criminal Complaint of December 2021

47. Mr. Gaitán made reference to the letter of Company arbitration counsel to the Tribunal of January 27, 2022 and confirmed that this was verified as to the facts' accuracy under penalty of perjury by Mr. Gaitán. (Tr. 06/03 at 230:2-18).

48. Per Mr. Gaitán's testimony, the signatory for DTH of the first Guatemala criminal complaint in December 2021 was an engineer who had worked under Gaitán's father in El Salvador and then was

[16] The issue of whether Mr. Gaitán was in fact the CEO of Continental Towers was already resolved by the Tribunal in the November 12 Order against Respondents and in favor of Claimants' position that on March 19, 2021, after the arbitration was underway, all Parties had re-affirmed Mr. Gaitán's status as Company CEO in writing. That letter agreement is in the record of this arbitration. That followed extensive written submissions of evidence and argument, and oral testimony subject to full cross-examination of Mr. Gaitán and Mr. Hernández. But Respondents continued to fill the record with assertions to the contrary.

moved to "run the operations in Guatemala under my direction." (Tr. 06/03 at 233:8-9). At the date and time referenced in the original criminal complaint (October 20, 2021) Gaitán "was in the hearings for the interim relief measure that Peppertree filed to the Tribunal." (Tr. 06/03 at 235:24-236:1). [17]

49. Mr. Gaitán did not receive notification of the filing of the December 2021 first criminal complaint from Respondents, or Mr. Guzman, or the prosecutor's office or the court. He learned of it in January 2022 as the result of follow-up by Mr. Gaitán's Guatemala employment counsel of information supplied in a conversation Mr. Gaitán had with Respondents' co-counsel Rafael Briz of the Mayora y Mayora law firm (identified by Mr. Gaitán in his testimony as Mr. Hernández's personal attorney) in December 2021. Mr. Gaitán initiated that conversation to propose an agreement that would enable him to "go back to the work in Continental Towers" (which the Tribunal understood to mean go back to work under the terms and working conditions that had prevailed at March 19, 2021). (Tr. 06/03 at 236:12-13). Mr. Gaitán's testimony was that Mr. Briz replied:

> [H]is [i.e. Mr. Briz's] answer was that Mr. Hernández sent me three messages. The first one, that I created great damage to the company. The second one, that there's not going to be any negotiation until I accept to resign from Continental Towers. But the third one is that until we didn't reach an agreement [understood by the Tribunal to mean for so long as they didn't reach an agreement], he [Mr. Hernández] is going to be entitled to put all – to take all the legal actions against me.[18]

(Tr. 06/03 at 236:14-24).

50. At that point Mr. Gaitán, understanding this last remark by Mr. Briz as a signal that one or more legal claims against Mr. Gaitán had been or would be filed, asked his employment lawyer to begin "monitoring with the judges and with general attorney's office if I have a complaint" and in mid-January the

[17] October 20, 2021 was in fact the date of a witness statement provided by Mr. Gaitán with exhibits. The oral hearing on interim relief that preceded the November 12 Order was held on October 22, 2021.

[18] The record shows that by this time Mr. Gaitán and Ms. Echeverría had also commenced employment litigation related to their separation from DTH in the competent court to hear employment claims in Guatemala. (In fact, Mr. Hernández asserted in a Witness Statement that their commencement of employment litigation was a reason they could not longer work for DTH. (Jorge Hernández Witness Statement, Feb. 7, 2022 at para. 13)Among the allegations made against Mr. Gaitán and Ms. Echeverría by Respondents in this arbitration was that the attorney they engaged for the employment case had been arrested on charges of money laundering. Respondents submitted to Morrison & Foerster as evidence of this occurrence a news media report of that arrest, and the Tribunal learned of this when the Morrison Memorandum was submitted by Respondents. Respondents failed to submit – either to Morrison or the Tribunal -- the available news media reports that the charges against this attorney had subsequently been dismissed. (PPT-AMLQ Ex. 73). The Tribunal learned this from a submission made by Claimants, and it was confirmed in Ms. Echeverría's June 3 testimony (Tr. 06/03 at 128:14-17: "No charges were put on him and he was released because of lack of merit. And that's something that's – was all over the news in Guatemala", confirmed Tr. 106/03 at 29 with reference to the newspaper article in *Prensa Libre*, "the largest printed media in Guatemala").

employment lawyer notified Mr. Gaitán of this December 2021 criminal complaint. (Tr. 06/03 at 236:25-237:7). That criminal complaint is currently "under dismissal process" because, according to the information provided to Mr. Gaitán by his counsel in Guatemala, the prosecutor's office "required two times to Mr. Carlos Rolando Guzman Lopez to confirm the claim, and he didn't show to the general attorney's [understood by Tribunal as the "prosecutor's" or "attorney general's"] office." (Tr. 06/03 at 240:6-12, confirmed Tr. 06/03 at 241:12-23 and Tr. 06/03 at 248:4-9).

Second Criminal Complaint in January 2022

51. Mr. Gaitán testified that the second criminal complaint in Guatemala (that is to say, the criminal complaint filed by DTH January 13, 2022 against another individual, and amended January 20, 2022 to assert complaints of criminal conduct against Mr. Gaitán and others, see below at para. 85) is in the same status as the first, that is to say, it is a complaint lodged with the prosecutor's office and the prosecutor has not made any decision to charge Mr. Gaitán with any crimes. (Tr. 06/03 at 245-249, confirmed Tr. 06/03 at 257). Concerning the alleged judicial proceeding for the issuance of provisional measures (*ne exeat* order and bank account attachment) dated February 4, 2022 reflected in Respondents' Ex. R-126, Mr. Gaitán testified that neither he nor Ms. Echeverría nor any attorney for either of them was present, because they had no advance notice of the proceedings. (Tr. 06/03 at 246, 251). They only learned of the alleged proceeding when they read Mr. Hernández's written testimony in this arbitration on February 8, 2022 and Respondents' submission on that date of Ex. R-126 (Tr. 06/03 at 253-254). Mr. Gaitán does not know if the two interim orders described in Ex. R-126 (*ne exeat* and bank account attachment) were officially entered, but did know that the orders had not taken effect and his bank accounts are "still working." (Tr. 06/03 at 261-262). Mr. Gaitán attended the June 3 evidentiary hearing in New York without violating any order, is lawfully outside Guatemala, is not a fugitive and has not been charged in Guatemala with any crime. (Tr. 06/03 at 223:14-16).

52. According to Mr. Gaitán, testifying based on what was reported to him by his Guatemala counsel in the criminal case, the February 4, 2022 hearing occurred because this criminal complaint did not first go to the prosecutor's office as is customary but was initially "put directly to a judge. The judge grant[s] these measures against us, and then they send the file to the general attorney's office… and they start an investigation…." (Tr. 06/03 at 255:11-17). As far as he knew from his counsel, who obtained and listened to the audio recording of the February 4 hearing, no evidence was presented at the February 4 proceeding represented by Ex. R-126. (Tr. 06/03 at 262).

53. Mr. Gaitán subsequently made a submission to the prosecutor's office through his counsel (Tr. 06/03 at 256:12-14) – and the Company's arbitration counsel provided an English translation to the Tribunal on June 30, 2022 pursuant to the Tribunal's request made during the hearing.

54. The provisional measures reflected in the February 4, 2022 proceedings record Ex. R-126 are the subject of a dismissal motion before the criminal court that was scheduled to be heard on May 24, 2022 but that hearing was postponed because "[a]t the last minute, Mr. William Rene Méndez (DTH's co-counsel in the criminal complaint filing, and father of Respondents' in-house attorney William Méndez Araújo) asked to postpone the hearing because he has like a back pain or some kind of sickness." (Tr. 06/03 at 256:16-22). Mr. Gaitán's testimony as understood by the Tribunal is that after May 24 but before the June 3 hearing, DTH's counsel in the criminal complaint matter made another submission of evidence to the prosecutor, consisting of Mr. Schachter's communications to the Tribunal (as certified by Mr. Gaitán) with their exhibits, which had been furnished to DTH criminal complaint counsel by the Mayora y Mayora law firm, co-counsel to Respondents. (Tr. 06/03 at 256-57).

Termination of Employment of Mr. Gaitán's Father

55. Mr. Gaitán, asked about his knowledge of the employment termination of his father at a DTH affiliate, testified that (i) Jorge Hernández asked Mr. Gaitán's father ("Gaitán Sr.") to issue "letters" commenting negatively on Peppertree's Board member John Rainieri, which Gaitán Sr. declined to do because he did not know Mr. Rainieri, (ii) he learned from his brother that, in October or November 2021, Jorge Hernández had asked his father to issue an affidavit stating that Mr. Gaitán suffered from mental illness (presumably for use in this arbitration, following the pattern of the roughly two dozen declarations filed by Respondents and purporting to be given by Respondents' employees in support positions of the Respondents in this case, including derogatory assertions about Mr. Gaitán's character and behavior toward fellow employees) , that his father refused to do so, and thereafter his father received a direct call from Mr. Hernández saying that under the current circumstances it was imperative that he be suspended from his position and he was instructed to remove all his belongings from his office in El Salvador within 24 hours. (Tr. 06/03 at 269-270). Mr. Gaitán testified that DTH continued to pay Mr. Gaitán's father through December 2021, perhaps January 2022, and then his father received a letter from Carlos Guzman (the same Carlos Guzman who acted as complainant in the December 2021 criminal complaint filing) saying that Mr. Gaitán's father had been terminated from his post with DTH in El Salvador because of misappropriation of funds. (Tr. 06/03 at 270-271).

56. The Tribunal observes that Mr. Guzman was among the witnesses that Respondents were ordered to bring to evidentiary hearings to testify before the Tribunal, and whose failure to appear was an unexcused violation of our Procedural Order 2022-07.

Claims of Embezzlement and Tax Fraud Against Mr. Gaitán and His Father in El Salvador DTH Affiliate Audit Report

57. Mr. Gaitán testified that it was some time later in January 2022 that he learned, from reading submissions in the arbitration filed by Respondents, of an alleged audit investigation that uncovered alleged embezzlement of funds by Mr. Gaitán and his father. (Tr. 06/03 at 276). Mr. Gaitán testified that there was no truth to the Respondents' allegations of embezzlement, and similarly no truth to Respondents' allegations to criminal tax fraud (Tr. 06/03 at 277).

58. Mr. Gaitán testified that the embezzlement allegations were part of a pattern of behavior typical of Mr. Hernández as Terra's controlling person: to terminate the employment of persons who refused to sign documents to support his positions in the arbitration, and then to provide an "excuse" (understood by the Tribunal to mean a false explanation that, if true, would have justified the employment termination). (Tr. 06/03 at 271-273).

59. Mr. Gaitán testified that the DTH affiliate in El Salvador was one of the longest-operating ("most aged") of the companies controlled by Mr. Hernández, and that it was managed with the participation of ("in conjunction with") Mr. Hernández, Mr. Quisquinay and Mr. Gaitán's father (Tr. 06/03 at 272). The Tribunal understood this testimony to mean that any actual embezzlement of funds by Mr. Gaitán's father could not have occurred without participation of or contemporaneous detection by Mr. Hernández and/or Mr. Quisquinay.

60. Mr. Gaitán also testified that transactions identified in the audit report as improper payments to him, to Ms. Echeverría and to others "actually are sales commissions which are referenced in the report linked directly to a site development, which are – it is normal." (Tr. 06/03 at 272). The Tribunal understood this to be corroborative of Ms. Echeverría's testimony (described below) that the audit report improperly portrayed as misappropriated funds amounts that were legitimately earned and paid as sales commissions to employees related to site development.

61. The Tribunal observes that our Procedural Order 2022-07 directed Respondents to produce, and they have failed without valid excuse to produce: (i) "[e]very document provided by Respondents or any of

their affiliates to the auditor that has conducted the forensic audit on behalf of the El Salvador DT entities", and (ii) "[t]he entire forensic audit file and workpapers of the auditor that has conducted the forensic audit on behalf of the El Salvador DT entities."

Oral Testimony of Ms. Carol Echeverría on June 3, 2021

62. Ms. Echeverría was shown her witness statement dated October 20, 2021 and she confirmed that it was truthful and accurate. (Tr. 06/03 at 66:19-67:6, 67:13-18). Respondents elected not to cross-examine Ms. Echeverría, and they have only controverted the contents of her witness statement in witness statements and oral testimony from October 2021 that the Tribunal, in making its November 12 Order, determined was not reliable and accurate. Accordingly, the contents of Ms. Echeverría's October 20, 2021 witness statement are treated in this Award as truthful and accurate. The summary of Ms. Echeverría's testimony below is supplemented as to certain details taken from that witness statement.

Meetings with Jorge Hernández in September 2021

63. In a private meeting initiated by Jorge Hernández and held at a Guatemala City restaurant, Mr. Hernández told Ms. Echeverría that Mr. Gaitán had not been invited by him to join in this meeting because Mr. Gaitán had damaged the Company by enabling Company counsel, Mr. Schachter, to send a letter to the Shareholders in March 2021 stating that the Company would only disburse funds to build new towers if the new towers were approved by all the Shareholders. (Tr. 06/03 at 74-75).

64. A meeting on September 28, 2021 initiated by Mr. Hernández, was held in Mr. Hernández's office within the Guatemala City office of DTH, was attended by Ms. Echeverría and her "team" including Marisabel Umana, Virginia Morales and Suly Ochoa. Mr. Gaitán was present, as were Mr. Hernández and two lawyers, William Méndez Jr. who works for certain of Mr. Hernández's companies, and Rafael Briz of Mayora y Mayora, one of the Respondents' counsel of record in this arbitration. (Tr. 06/03 at 77-87).

65. At the instruction of Mr. Hernández, each member of the "team" was directed to hand over their computer to a representative of the DTH information technology department, according to Mr. Hernández so that a "backup" of the data on their computers could be made. The IT department representative arrived with "some external memory devices" to accomplish this "backup." (Tr. 06/03 at 85).

66. This “backup” regimen was disconcerting for Mr. Gaitán “because he couldn’t give complete backup of his personal computer, because it was personal and because he has there, later on I understood, a lot of information about the case, about the arbitration process, so he could not deliver those documents to one of the part[ie]s of the arbitration.” (Tr. 06/03 at 85).

67. This was clarified in testimony in response to a question from the Chair of the Tribunal:

> Q. If I understand correctly, you’re saying that Mr. Gaitán’s concern, as you understood it to be expressed at the meeting, was that part of the information on his personal computer related to the arbitration and his role as an officer of the company, correct?
>
> A. Correct. I think it’s correct.
>
> Q. And Mr. Gaitán’s concern as expressed was that access to that information should not be given exclusively to one shareholder rather than to both shareholders at the same time, is that correct?
>
> A. That’s correct. That’s my understanding of that.

(Tr. 06/03 at 86).

68. The previous day Mr. Gaitán had asked Ms. Echeverría and her team, by text message sent from a meeting he was having with Mr. Hernández that Ms. Echeverría did not attend, to remove his personal effects from his office and put his belongings in his car. Ms. Echeverría had complied. (Tr. 06/03 at 90-91).

69. The lawyers, Mr. Rafael Briz and Mr. William Méndez Araújo (son of the attorney William Méndez who represented DTH with another attorney in the 2022 criminal proceedings), went outside to inspect Mr. Gaitán’s car “to see if he has stolen property from the company because he asked us to empty his office.” (Tr. 06/03 at 90). Mr. Briz and Mr. Méndez Araujo confirmed that there were only personal items belonging to Mr. Gaitán in his vehicle, and an ensuing inspection of Mr. Gaitán’s office by them also showed that only personal items had been removed. (Tr. 06/03 at 90-91).

Respondents’ Allegations of Criminal Conduct by Ms. Echeverría and Mr. Gaitán

70. Claimants' counsel questioned Ms. Echeverría about Mr. Hernández's accusations of misconduct made in his witness statement dated January 28, 2022 (to which no weight is given in favor of Respondents' by the Tribunal for the reasons we have stated).

> Q. In paragraph 26 Mr. Hernández says about you, "Second, Echeverría's reckless disregard for the confidentiality of DT's sensitive information, including attorney-client privileged information, shows exactly why she and Gaitán cannot be allowed to access the offices of DT Guatemala. They are abusing confidential information they stole from DT when they left and have refused to return, and they are doing it to support their baseless employment law claims in Guatemala." Do you see paragraph 26?
>
> A. Yes.
>
> Q. What's your response to that allegation?
>
> A. We did not steal anything and we did not disregard the confidentiality.
>
> Q. Do you have a view as to why it is at this point in time that Mr. Hernández would accuse you of such things?
>
> A. In my opinion, it has a lot to do with the first witness statement we submitted in this arbitration process.
>
> Q. Being the fact that you wouldn't take Mr. Hernández's side?
>
> A. Yes. I mean, we – when we started being neutral, Mr. Hernández was not happy with us because we were trying to be neutral. And in my witness statements before you can see that he asked – he mentioned that I was not writing letters to support his case, and then with the – with annexed we included in the first and second witness statements, that's what he thinks it's like violating confidentiality.

(Tr. 06/03 at 100-01).

71. On February 4, 2022, Ms. Echeverría had no knowledge of a hearing in a criminal proceeding against her that was held in a Guatemala criminal court. She learned about it for the first time in the from the witness statement of Mr. Hernández submitted in this arbitration on February 7, 2022. (Tr. 06/03 at 102-103).

72. Ms. Echeverría through her lawyers in Guatemala was able to obtain information from the prosecutor's office about the criminal complaint against her and Mr. Gaitán. In that way she has learned that "we are not charged with any crime." Of significant importance, she learned that the evidence filed by DTH in support of the criminal complaint consisted of the exhibits to Mr. Gaitán's and/or Ms. Echeverría's October 20, 2021 witness statements in this arbitration. "So that's the proof that we disclosed confidential information." (Tr. 06/03 at 107, confirmed at Tr. 06/03 at 119-123). That evidence

also included photos taken by the security cameras in the DTH office parking lot in Guatemala City on September 27, 2021 showing Ms. Echeverría putting Mr. Gaitán's personal belongings and an empty package of a USB memory stick in his vehicle. (Id.)

73. The criminal complaint against Ms. Echeverría and others (filed January 2022, as it was later learned) involved some irregular aspects according to the report to Ms. Echeverría from her lawyer. One was that the proceeding was initiated against another individual, and then amended to include Mr. Gaitán, Ms. Umana, Mr. Berger and Ms. Echeverría. Another was that it is not customary that precautionary measures such a *ne exeat* and attachment would be entered by the court before there had been any investigation by the prosecutor's office or a request from the prosecutor's office for such measures based on their investigation. (Tr. 06/03 at 110--112).

> In this case that didn't happen. They went directly to the judge. They had a claim against someone else, someone don't know for these allegations, for aggravated theft, fraud, material misrepresentation, use of information and criminal conspiracy. So they did it for this third person that, according to our personal lawyers, does not exist. That number, that identification number does not exist, and the name doesn't match with the identification number. (Tr. 06/03 at 110-111).

74. The court order granting precautionary measures has not yet been withdrawn, due to the postponement of a scheduled May 24 hearing that did not occur "because at the last moment Mr. William Méndez Sr. who is the one that's doing the case against us at the last moment said he could not attend because he has a back pain or something. So we were not able to have the hearing about it." (Tr. 06/03 at 111-112).

75. These precautionary measures did not come into existence as a court order on February 4, 2022, but "around March." (Tr. 06/03 at 115). The *ne exeat* order, to the extent it is in force, has not been violated by Ms. Echeverría because she has been outside Guatemala the entire time since the order was issued. (Tr. 06/03 at 115). (The Tribunal understands Ms. Echeverría's testimony to be that she did not violate the *ne exeat* order, because in her own personal situation, being outside of Guatemala, there was no occasion to test whether it was being enforced or not). The bank account attachment to her knowledge has never been delivered to any of her banks. (Tr. 06/03 at 116).

76. Ms. Echeverría submitted a written witness statement to the prosecutor's office. (Tr. 06/03 at 122). This was later provided to the Tribunal by the Company's counsel based on the Tribunal's request.

Claims of Embezzlement in El Salvador DTH Affiliate Audit Report

77. With reference to the El Salvador DTH affiliate's forensic audit indicating improper payments, Ms. Echeverría testified that the payments were entirely proper sales commissions on co-locations in the Continental Towers portfolio that were paid to incentivize the sales force. (Tr. 06/03 at 144-149). The possibility of stealing funds did not exist, as all payments had to be approved by the financial department led by CFO Quisquinay. (Tr. 06/03 at 148). She received instructions to use sales commissions to incentivize the sales force and assumed those instructions originated with Mr. Hernández. (Tr. 06/03 at 150-151).

CONCLUSIONS

78. Based on the entire record before the Tribunal including the oral testimony of Mr. Gaitán and Ms. Echeverría and Ms. Ruti Smithline, partner in the Morrison & Foerster law firm (as discussed separately below in the context of the Morrison Memorandum at paras. 90 *et seq.*), the documents from the Guatemala criminal complaint case docket furnished by Company counsel on June 30, 2022 in response to the Tribunal's request on June 3, and the adverse inferences resulting from Respondents' unexcused failure to produce evidence that the Tribunal ordered them to produce, the Tribunal makes the following conclusions pertaining to the question of whether sanctions should be imposed and if so what sanctions:

1) Jorge Hernández acting for the Respondents forced Jorge Gaitán and Carol Echeverría out of their DTH positions in September 2021 because he considered them to be insufficiently supportive of the Respondents' position in this arbitration. The notion that they were replaced in their DTH positions because they abandoned those positions was correctly rejected by the Tribunal in our November 12 Order, and the record as it has been developed confirms that. Respondents' insistence, in post-November 12 submissions to this Tribunal, in courts of law, and in soliciting the Morrison Memorandum from Morrison, that they abandoned their DTH posts, has been a stubborn and costly adherence to fabricated facts.

2) In this regard, we are particularly influenced by our deeper appreciation for the mistreatment of Mr. Gaitán at meetings called by Mr. Hernández in the Guatemala City offices of DTH on September 27-28, 2021.

a) The interactions among Mr. Gaitán, Ms. Echeverría and Mr. Hernández on and around September 27-28, 2021 were the result of a confrontation demanded by Jorge Hernández to register his displeasure with the Company's positions in the arbitration which he found to be

insufficiently supportive of Respondents. This was part of an effort by Mr. Hernández to overcome the Shareholders' letter agreement signed March 19, 2021 concerning the neutrality of the Company in the arbitration by forcing the Company's Executive Management team to act, in fact, in a fashion that favored Respondents' position.

b) Mr. Gaitán, having a well-founded fear that he was about to be terminated and would be unable to return to the DTH office premises to retrieve personal items, asked his co-workers Carol Echeverría, Juan Berger and Marisabel Umana to assist him in loading his personal items in his vehicle. They did so. This occurred on September 27, 2021 while Mr. Gaitán was in a meeting with Mr. Hernández.

c) The photos submitted to the Guatemala criminal prosecutor by DTH as exhibits to the amended January 2022 criminal complaint – photographs taken by the security cameras in the parking area of the DTH affiliate offices in Guatemala City on September 27, 2021, showing Mr. Gaitán's colleagues loading items in his vehicle -- do not show DTH property being stolen by Mr. Gaitán, but reflect the placement in Mr. Gaitán's vehicle of personal items of Mr. Gaitán.

d) At the insistence of Mr. Hernández, another meeting was held at the DTH Guatemala City office on September 28, 2021, on one hour's notice, attended by: Messrs. Gaitán, Berger and Hernández, Ms. Echeverría and Ms. Umana, and also, as relevant here, Respondents' outside counsel and arbitration co-counsel Rafael Briz and DTH in-house lawyer William Méndez Araújo (as noted, the son of the 2022 criminal complaint co-counsel William Rene Méndez).

e) The office facility in which the meeting was held was secured by armed bodyguards under the control and direction of Mr. Hernández. This fact caused Mr. Gaitán to be under justifiable fear of physical coercion.

f) At this meeting, Mr. Hernández accused Mr. Gaitán of having removed company assets (meaning, in this context, property of Continental Towers or DTH) from Mr. Gaitán's office. Mr. Gaitán denied this, explaining that he had only removed personal items and that they were still in his vehicle. Mr. Hernández ordered Mr. Briz and Mr. Méndez Araújo to search Mr. Gaitán's personal vehicle, which they did, and the search revealed that there was no Company property in the vehicle but only, as Mr. Gaitán has asserted, the personal items he had caused his colleagues to place in the vehicle during the preceding day.

g) Mr. Hernández also ordered a search of Mr. Gaitán's office and work space, done shortly after the completion of the vehicle search, by Mr. Briz and Mr. Méndez Araújo, and it was confirmed that no Continental or DTH property had been taken.

h) In the same meeting, Mr. Hernández demanded that Mr. Gaitán, Ms. Echeverría, Ms. Umana and Mr. Berger turn over their computers to the head if the IT department ostensibly to be "backed up," and they complied. This resulted in "backing up" (that is to say, copying) of all the files on their respective computers including the Company's operating files. The copied data was saved to external hard drives brought in by the IT department. Mr. Hernández and Mr. Briz told Mr. Gaitán that he could not leave until the computer "backups" were completed - which as to Mr. Gaitán's personal laptop computer did not occur until 10:30 pm, by which time Mr. Gaitán had been detained under fear of physical restraint by armed guards for more than seven hours.

i) Therefore the only evidence in the record concerning the allegations of the amended criminal complaint of January 20, 2022 that "*the defendants did not hand over the information in their computers, as they emptied more than ninety-five percent of all the information they contained before returning them*" and that this "*destruction with no authorization shall be considered a criminal offense*" shows that these allegations were baseless. So too are the other related factual allegations in that amended criminal complaint, for example that Mr. Gaitán and the other defendants "*planned in advance to destroy and erase all the records that were available in the computers and cell phones that they used … for their own personal benefit and harming [DTH].*" (emphases supplied).

j) Concerning the participation of Mr. Briz in the meetings and events of September 28, 2021, we observe that Mr. Briz has been co-counsel to Respondents in this arbitration from the start. The Company, of which Mr. Gaitán was CEO, had separate legal representation in the arbitration, approved on March 19, 2021 in writing by all the Shareholders of the Company, and so in any meeting concerning the arbitration in which Respondents' counsel were present, Mr. Gaitán as Company CEO should have been afforded the opportunity to have the Company's counsel participate. Mr. Briz as Respondents' co-counsel in a New York seated international arbitration ought to have been sensitive to the observance of international standards of conduct for lawyers in international arbitration. *See, e.g.*, Guideline 19 in the IBA Guidelines on Party Representation in International Arbitration (2013) ("A Party Representative should make any potential Witness aware that he or she has the right to inform or instruct his or her own counsel about the contact and to discontinue the communication with the Party Representative.") Instead he contributed to the coercive environment of the meeting orchestrated by Mr. Hernández. Mr. Hernández's insistence during that meeting to hold Mr. Gaitán hostage by express or implied threats of (1) DTH employment-related retaliation, and (2) physical intervention of armed guards

reporting to Mr. Hernández[19], until a "backup" of his personal laptop computer was made, enabled Mr. Hernández to copy electronic communications between Mr. Gaitán and Company counsel, between Mr. Gaitán and Claimants or their counsel, and Mr. Gaitán's own personal notes about his Company work, that may have been stored on his devices, whether stored on the DTH email server or otherwise. Mr. Briz, as co-counsel in the arbitration should have advised his client that the rules of arbitration governed information exchange among the Parties and that the potential involuntary procurement of arbitration-related information stored on Mr. Gaitán's computer and belonging to the Company or to Mr. Gaitán personally raised questions of propriety that should have been addressed before information was unilaterally seized. Moreover, by September 28, 2021, this Tribunal had already set boundaries for information exchange that limited disclosure in Phase 1 of the arbitration. Those boundaries were applicable to all Parties and the unilateral seizure, potentially, of communications between Mr. Gaitán and Claimants held on Mr. Gaitán's personal computer was in disregard of our rulings.[20]

k) Mr. Gaitán, deprived of the ability to consult Company counsel during the meeting let alone to have Company counsel present, could not have been expected to know what his obligations were as company CEO to protect arbitration-related communications from such forced seizure.

79. There was no wrongdoing by Mr. Gaitán in connection with the so-called "Panama [OFG] Project" much less any wrong-doing that first came to light after our November 12 Order, as Respondents falsely asserted when they first raised this matter in November 2021 in the context of seeking reconsideration of the November 12 Order and removal of Mr. Gaitán from Company Management. The undisputed

[19] The presence of armed guards under the control of Mr. Hernández is a fact mentioned in the witness statement of Mr. Gaitán given to the Guatemala prosecutor's office, furnished by Company counsel to the Tribunal on June 30, 2022. Mr. Schachter's letter to the Tribunal dated October 11, 2021, verified by Mr. Gaitán, referred to the presence of Mr. Hernández's "personal security staff."

[20] The Tribunal on August 12, 2021 entered Procedural Order No. 3 that adopted a Phase 1 process concerning sale of the Company and stated that "[d]isclosure relevant and material to Phase 1 may be sought in the manner specified in Procedural Order No. 2." Paragraphs 42 *et seq.* of Procedural Order No. 2 set forth a Tribunal-supervised method for Parties to seek documents from other Parties via Document Production Requests at such times as the Tribunal would allow. Whether, in the context of the arbitration and the Company's arbitration status as a "Nominal Party,"a Shareholder like Terra or its affiliate DTH could make a demand outside the arbitration to obtain the Company's communications with the other Shareholders was not a question Respondents and their counsel should have answered by unilateral seizure of Mr. Gaitán's personal computer and copying of all data on that computer under the pretext of making a backup of data sent or received on the DTH email server.

evidence in the record (which includes Mr. Hernández's January 28, 2022 and February 8, 2022 witness statements, although these are given no weight by the Tribunal based on his refusal to appear for cross-examination as ordered) is that Mr. Hernández was fully informed of the transaction between DTH and OFG and approved of it, and that no liability of the Company arose from the transaction, whether by virtue of Mr. Gaitán stating that he was "attorney in fact" for the Company or otherwise. (*see* above at para. 41). There was no impropriety by Mr. Gaitán in making reference to himself as attorney-in-fact for the Company, as he was its CEO.[21]

80. There was no merit to the allegations of embezzlement or tax evasion made in the El Salvador DTH affiliate's audit report after the termination of Mr. Gaitán's father as El Salvador country manager for DTH and his replacement with Carlos Guzman. The alleged funds misappropriations described in that report were properly-earned sales commissions of employees and proper expense reimbursements. We find that the preparation of this audit report was motivated in part by Respondents' desire to present an apparent justification for the employment termination of Mr. Gaitán's father, a long-time DTH employee, when in fact that termination was a retaliation directed by Mr. Hernández for the refusal of Mr. Gaitán's father to participate at the request of Mr. Hernández in his efforts to tarnish Mr. Gaitán in this arbitration. These conclusions are based on the testimony of Mr. Gaitán and Ms. Echeverría, which the Tribunal found to be credible; the additional enhancement of credibility resulting from Respondents' election not to cross-examine them; the suspicious timing of the audit report itself; the inferences of collaboration in the manufacture of false evidence that we draw from the fact that Mr. Guzman was both the successor to Mr. Gaitán's father as country manager in El Salvador and the nominal complainant in the December 2021 criminal complaint in Guatemala, and the adverse inferences resulting from Respondents' unexcused disregard of our order (PO 2022-07) to produce documents concerning this audit report.

81. The December 2021 criminal complaint against Mr. Gaitán filed in a Guatemala criminal court by a DTH employee, Mr. Guzman, a proxy for DTH, was based on alleged "Theft" of information that consisted of Mr. Gaitán having submitted DTH documents, that were allegedly DTH confidential information, as exhibits to a certified statement he made in this arbitration on October 20, 2021. We find there was no

[21] Respondents have made no submission that British Virgin Islands law, applicable to the Company, or Panama law, applicable to DTH, prohibits a CEO from claiming to be its attorney-in-fact. We also observe that Respondents' effort to have Mr. Gaitán removed from his role as Company chief compliance officer with responsibilities for compliance with the US Foreign Corrupt Practices Act, and equivalent applicable laws of other nations, is seemingly at odds with the position that he was not an attorney-in-fact for the Company.

good faith factual basis for - Mr. Gaitán's conduct to have been the subject of a criminal complaint and that the treating of that conduct as criminal was retaliatory for Mr. Gaitán's neutral role in the arbitration as Company CEO:

1) Mr. Guzman was among the witnesses whom we ordered Respondents to cause to appear to testify in the evidentiary hearing, and without valid excuse Respondents determined that Mr. Guzman would not appear. The alleged DTH confidentiality agreement that allegedly limited Mr. Gaitán's ability as Company CEO to use in the arbitration DTH records to which he had access in his DTH role, was not produced to the Tribunal. In the proceedings leading to the November 12 Order, no motion was made by Respondents to strike from the record any of the exhibits to Mr. Gaitán's certified statement of October 20, 2021. These exhibits, like all exhibits in the arbitration, are Confidential Information under the Confidentiality Order in this case, and it is not alleged by Respondents in this arbitration, or in DTH's Guatemala criminal complaints, that these exhibits were deployed in the arbitration as a means to channel them to a wider audience.

2) Of the five exhibits presented with Mr. Gaitán's witness statement of October 20, 2021, only Exhibits JG-1 and JG-6 were internal to DTH or Respondents. [JG-5, initially presented in error, was removed]. JG-1 was an internal memo to employees dated October 23, 2020 announcing the commencement of arbitration among the Shareholders of the Company and saying that communications about the arbitration from the Company or any Shareholder should be directed to Kristha Pineda (an aide to Mr. Hernández). Nothing about that memo could conceivably warrant the filing of a criminal complaint alleging theft or misappropriation of DTH secrets that consisted of displaying that memo in this arbitration. As to Ex. JG-6, the excerpts of that document that were translated into English for the Tribunal were generic expressions of praise and commendation by Mr. Hernández for the work of Mr. Gaitán and Ms. Echeverría prior to the commencement of this arbitration.

3) We cannot fathom how, in good faith, these items could be made the subjects of a criminal complaint for theft of DTH confidential information. It is therefore not surprising to learn, as we did in the June 3 hearing and from the additional information provided by the Company in response to the Tribunal's request — that the present status is that no criminal charges bearing the imprimatur of a prosecutor have ensued from the December criminal complaint filed for DTH in the name of Mr. Guzman.

82. Every activity in this arbitration founded on the premise that Mr. Gaitán stood justly accused of serious crime in the December 2021 Guatemala criminal complaint (and also the January 2022 criminal complaints, treated in the ensuing paragraphs) was a waste of time, energy and expense because that

criminal complaint was a contrivance by Respondents. This could not have been unknown to Respondents' arbitration counsel unless they willfully blinded themselves to the truth by asking no questions about the basis for the December 2021 Guatemala criminal complaint.

83. It follows that the publication on January 10, 2022, by DTH affiliates in Guatemala, Panama and Costa Rica, in widely distributed online news media and a press release, of broad categorical statements of disassociation from Mr. Gaitán and Ms. Echeverría, cannot reasonably have been motivated by a genuine business motive of DTH or Terra to protect the goodwill and reputations of the local DTH affiliates in those countries. The filing of a new criminal complaint by DTH via Mr. Méndez Álvarez and Mr. William Rene Méndez as co-counsel on January 13, 2022, against an alleged individual who was misdescribed therein as an employee of DTH, and that morphed into an "extended" and "expanded" complaint against Mr. Gaitán and Ms. Echeverría and their alleged co-conspirators on January 20, 2022, and Respondents' approach to Morrison for an Opinion in the days between the January 13 and January 20 versions of the criminal complaint, lend strong support to this view.

84. It similarly follows that the Respondents' refusal to comply with our March 15, 2022 Order, calling for the publication of corrective notices, cannot be justified, nor can the severity of sanction for non-compliance be mitigated, on the basis that DTH and its affiliates had a genuine business motive to be publicly disassociated from Mr. Gaitán and Ms. Echeverría as a result of the December 2021 Guatemala criminal complaint[22] or the January 2022 Guatemala criminal complaints. The factual allegations underlying these criminal complaints, as Respondents clearly knew, were innocuous facts intrinsic to the arbitration evidence, and Respondents distorted those facts in service of a plan to oust Mr. Gaitán and Ms. Echeverría from Company management, an ouster that in turn was in service of the broader objectives of a more favorable position against Claimants in the arbitration.

85. We also find based on the entire record before us that the second criminal complaint action pursued in Guatemala by DTH, begun January 13, 2022, was – like the initial criminal complaint action separately filed in December 2021 with the DTH employee Mr. Guzman as the nominal complainant -- an entirely

[22] Mr. Guzman personally may not have had knowledge of the falsity of the alleged facts he relied on in filing the December 2021 criminal complaint on behalf of DTH, at the time of the filing. But in this arbitration DTH adopted that criminal complaint and asserted the veracity of the underlying facts and their sufficiency to establish crimes under the law of Guatemala by presenting that criminal complaint to this Tribunal as evidence in support of the removal or suspension of Mr. Gaitán as Company CEO, as an excuse for non-compliance with the November 12 Order, and as a factor in mitigation of potential sanctions.

pretextual effort to manufacture false evidence of criminality on the part of Mr. Gaitán and Ms. Echeverría for the specific purpose of deploying that false evidence of criminality to Respondents' tactical advantage in this arbitration. Many factors support this conclusion, as listed here:

1) Each of Mr. Gaitán and Ms. Echeverría in their oral testimony before the Tribunal on June 3, 2022, testified that the allegations made against them in the January criminal complaint were without any merit, and Respondents elected not to cross-examine them or to present other evidence that their testimony should be discredited in whole or in part.

2) The Tribunal found the oral testimony given by Ms. Echeverría and Mr. Gaitán to be highly credible and reliable, on the matter of the January 2022 criminal complaints and otherwise. The documentation obtained by them from the Guatemala court per the Tribunal's request during the June 3 hearing and delivered to the Tribunal by Company counsel on June 30, 2022 corroborated in all material respects their testimony on June 3 about what they had learned about the criminal proceeding through their counsel in that proceeding - notably as to (1) the fact that the action had been commenced by a complaint against an individual unknown to them (and evidently entirely fictitious) and thereafter had been extended to include them, (2) the fact that DTH had presented to the court as evidence of Mr. Gaitán's criminality photos taken by DTH purporting to show someone placing items in Mr. Gaitán's car at the Guatemala City office of DTH on September 27, 2021, which was not in fact a theft of company property but the deposit of Mr. Gaitán's personal belongings, as was personally verified by Mr. Briz in his inspection of Mr. Gaitán's vehicle and Mr. Gaitán's office on September 28, 2021, and (3) that Mr. Gaitán had delivered to the court and the prosecutor a written statement concerning the facts alleged in the criminal complaint.

3) The Tribunal in making its November 12, 2021 Order granting interim relief found Mr. Gaitán's version of the events of September 27-28, 2021 to be credible and Mr. Hernández's version of those events not credible -- after considering the evidence submitted including their respective witness statements and their respective oral testimony during the evidentiary hearing on October 22, 2021. Our November 12 Order would not have been made as it was if we had embraced the contention advanced by Mr. Hernández at that time that Mr. Gaitán and Ms. Echeverría had not been terminated but instead had abandoned their DTH positions.

4) The witness statements of Jorge Hernández presented by Respondents, dated January 28, 2022 and February 8, 2022, remain in the record but the Tribunal gives them no weight as a consequence of Mr. Hernández's unexcused refusal to appear as a witness in the evidentiary hearing announced in PO 2022-06, as specifically ordered in PO 2022-07. This entails that Mr. Hernández's insistence in those

witness statements upon a version of his interactions with Mr. Gaitán on September 27-28, 2021 that would support the claims of criminal conduct by Mr. Gaitán is not considered in support of Respondents' position, and in any event was persuasively contested by Mr. Gaitán's live, sworn testimony before us, which we credit.

5) The original and amended January 2022 criminal complaints filed on January 13 and 20, 2022, respectively, as provided to the Tribunal by Company counsel on June 30, 2022 in fulfillment of the Tribunal's request at the June 3 hearing, show that the lawyers involved in these court filings in Guatemala were William Rene Méndez (father of Terra's in-house counsel William Méndez Araújo, as noted earlier an eyewitness to the events of September 27-28, 2021) and Mario Roberto Méndez Álvarez. Those two attorneys were among the witnesses that Respondents inexcusably refused to cause to appear before our Tribunal to give oral testimony, in violation of PO 2022-07. Had they testified, they would have been asked what evidence of the alleged criminality was in their possession at the time these complaints were filed. Had they testified, and if Respondents had provided these criminal complaints to the Tribunal by May 12, 2022 as PO 2022-07 required, they would have been asked to explain why the criminal complaint was initially filed January 13, 2022, against an individual named Edward Perez Gonzalez, alleging that he had been an employee of DTH's Guatemala affiliate and had committed the alleged crimes on September 11, 2021. They would have been asked to explain why it was that on January 20, 2021, the Gonzalez Complaint was "extend[ed]" to Mr. Gaitán, Ms. Echeverría, and two other DTH employees Juan Berger and Marisabel Umana, why it was that the original complaint had been "involuntarily and mistakenly filed against" Mr. Gonzalez "who has no connection with the facts and is not [DTH's affiliate's] employee" (as was stated in the January 20, 2022 version of the criminal complaint).

6) That is to say, in other words, they would have been asked why the January 13 complaint was admitted by them and by DTH one week later to have been made against a mis-identified person who in fact never worked for DTH if he even existed, and to have been based on alleged set facts that were omitted entirely from the January 20 amended version. Mr. William Rene Méndez, whom the record shows to be the father of William Méndez Araújo, the latter an in-house lawyer of Respondents who was the principal link between Respondents and Morrison & Foerster, and who actively solicited the Morrison Memorandum from Morrison even before the Gonzalez Complaint was superseded by the January 20 "extend[ed]" version (), would also have been asked what he told his son, for purposes of relaying information to Morrison, about these criminal complaints and the facts that motivated the filings. Finally, Mr. William Rene Méndez would have been asked about the connections between the January 2022 criminal complaint filings in Guatemala and the solicitation by his son as a lawyer for Respondents within

the same week from Morrison of a Memorandum opining that Mr. Gaitán's alleged criminality made it inadvisable for Mr. Gaitán to remain in his Company position as the Company's FCPA compliance officer.

7) Based on Respondents' unexcused refusal to comply with PO 2022-07 in regard to (1) oral testimony of William Rene Méndez and Mario Roberto Méndez Álvarez[23], (2) production of documents concerning these criminal proceedings, and (3) production of documents provided to Morrison, the Tribunal draws an adverse inference: that neither witness would have been able to answer in a manner helpful to Respondents' positions in the arbitration questions such as those mentioned above about whether Mr. Gaitán and Ms. Echeverría had engaged in misconduct that made them unsuitable to continue in Company management roles and about whether their misconduct justified Respondents' non-compliance with our November 12, 2021 and March 15, 2022 Orders.

86. Because (1) Respondents elected not to cross-examine Ms. Echeverría and Mr. Gaitán on June 3, 2022, (2) Respondents did not reconsider that election after the Tribunal received on June 30, 2022 the written declarations of Mr. Gaitán and Ms. Echeverría filed in the Guatemala criminal case on April 25, 2022, and (3) the Tribunal found Mr. Gaitán and Ms. Echeverría to be credible witnesses, we accept and credit fully their accounts in written and oral testimony pertinent to the 2022 criminal complaint's allegations. We therefore determine the pertinent facts to be as set forth above.

87. Mr. Gaitán stated on April 25, 2022 in his motion to dismiss the criminal complaint (provided to the Tribunal and all counsel on June 30, 2022): "*The complaint. . . is a retaliatory action against me and the Executive Team … for having fully complied with our fiduciary duties to the company and for not having allowed ourselves to be intimidated by one of the shareholders.*" Without adopting that assertion in its terms, we do find that the pleaded allegation in the January 20, 2022 amended criminal complaint that on September 27, 2021 Mr. Gaitán assisted by Ms. Echeverría, Mr. Berger and Ms. Umana "*remove[d] all the legal and technical documentation from Proyectos Terrestres' offices …[and] abused my client's trust to take possession of such confidential documents, of high business and commercial value*" was false, and we draw the inference that a primary reason for the refusal of Respondents to comply with our order to

[23] Our purpose in requiring the testimonial appearances of Mr. William Rene MéndezMéndez and Mr. MéndezMéndez Álvarez was primarily to gather more specific information about the procedural aspects of the 2022 Guatemala criminal court proceedings and especially the written declaration of Mr. MéndezMéndez Álvarez concerning the February 4, 2022 provisional measures hearings that was the subject of his written declaration submitted into evidence by Respondents as Ex. R-126. It was not our intention to probe privileged communications between them and Respondents.

produce as hearing witnesses Mr. Hernández, Mr. William Rene Méndez, and Mr. Méndez Álvarez is that they could not have provided truthful evidence to support this allegation.

88. From the foregoing the Tribunal concludes that the allegations of criminality in the January 20, 2022 Guatemala amended criminal complaint were deliberate falsehoods and that the sources of the falsehoods were, directly or indirectly, Mr. Hernández and/or Mr. Briz and/or Mr. Méndez Araújo.

89. We take note at this juncture of how it evolved that the Tribunal ultimately came to have before it the facts that enable us to reach these conclusions. We do so because it is now obvious that the Guatemala criminal matter was presented to the Tribunal in a deliberately incomplete fashion so that the truth would not readily emerge.

1) We learned from Respondents on February 8, 2022 that in a criminal proceeding in Guatemala on February 4, 2022 an order for provisional measures — in the form of bank account attachment and "ne exeat" relief barring departure from Guatemala — had ostensibly been entered against Mr. Gaitán, Ms. Echeverría, Mr. Berger and Ms. Umana. An alleged "court assistant"'s summary of that February 4 interim relief proceeding was submitted by Respondents as Exhibit R-126 on February 8. This was part of an exhibit that also contained a declaration by Mr. Méndez Álvarez attesting to occurrence of the court proceedings in which the order had been entered and the alleged authenticity of the court assistant's summary annexed thereto. This Exhibit R-126, in turn, accompanied a witness statement of Mr. Hernández submitted in opposition to Claimant's initial motion for sanctions for non-compliance with the November 12 Order. The "court assistant" statement that is Ex. R-126 referred to an audio record of the hearing but Respondents did not provide a transcript or explain why they could not do so.

2) We received no judgment or order bearing the signature of a judge. We were not given the criminal complaints, original and amended, that have now recently been provided by Company counsel based on the Tribunal's request. By withholding those pleadings from the Tribunal, Respondents concealed from us, as discussed above, the fact that the January 2022 criminal complaint had initially been filed against another individual based on entirely different facts allegedly having occurred on September 11, 2021, concealed the fact that Respondents' counsel in the criminal case were somehow able to "expand" and "extend" that original complaint to Mr. Gaitán *et al.* even while admitting in the amended complaint that the original complaint had been made by them upon the basis of alleged criminal actions that were in fact never taken, by an individual who in fact never had been employed by the DTH Guatemala affiliate, if he even existed.

3) As previously indicated, we received from Respondents' co-counsel Mr. Joseph on March 30, 2022[24], a report of non-compliance with our March 15, 2022 sanctions order, PO 2022-01, directing publication of corrective notices concerning the status of Mr. Gaitán and Ms. Echeverría to mitigate the harm caused by the January 10, 2022 publication by DTH affiliates' of notices of disassociation from them. Mr. Joseph's letter explained that the justification for DTH's refusal to publish the corrective notices was, in part, that Mr. Gaitán and Mr. Echeverría **"are under indictment for criminal acts which potentially place each local subsidiary in violation of local laws."** (emphasis supplied). After the evidentiary process undertaken in this proceeding, it is irrefutable that there were no indictments. There were only criminal complaints by civilians (the DTH affiliate in Guatemala), and with the possible exception of the February 4 interim hearing whose bona fides have not been established, these complaints by DTH have never been the subject of a judicial hearing but only have been submitted to the prosecutor's office in Guatemala for investigation, and no indictments or equivalent formal criminal charges against Mr. Gaitán or Ms. Echeverría have ever ensued. Either Mr. Joseph knew, or at a minimum he should have known, that there had been no indictments when he told the Tribunal on March 30, 2022 that there were indictments.

4) When this Tribunal announced that it would conduct an evidentiary proceeding to determine the truth about the various categories of misconduct raised in Respondents' evidence, Mr. Joseph did not correct his false statement to the Tribunal and explain why it was that the DTH-sponsored criminal complaints to the Guatemala prosecutor had been mis-described by him as indictments. Even since June 3, when Respondents heard undisputed testimony from Mr. Gaitán and Ms. Echeverría that no charges were ever brought against them by Guatemala prosecutors, Mr. Joseph has not communicated with the Tribunal to explain the material error in his March 30 submission.

5) Mr. Rafael Briz, one of the co-counsel to Respondents had, as the record now establishes, personal knowledge that the alleged factual basis for the 2022 Guatemala criminal complaint (as amended) was false, and that it was therefore false and misleading to present evidence of the alleged criminality of Mr. Gaitán and Ms. Echeverría, whether in the form of the alleged record of the February 4, 2022 interim measures hearing or otherwise. He failed to disclose or cause his clients to disclose to the Tribunal facts personally known to him that disproved the spurious presentation of facts allegedly constituting crimes that victimized DTH.

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[24] As a formal matter Mr. Joseph and his firm have identified themselves as counsel to DTH and Mr. Hernández. But save for Mr. Joseph having asserted his own unavailability as a basis to object to proposed hearing dates, all of the Respondents have joined in the positions taken by any of them. In the matter of DTH's Guatemala criminal complaints, however, Mr. Joseph, as the identified arbitration counsel for DTH, bore a particular obligation toward this Tribunal to inform us truthfully about DTH's actions.

6) Not only the Respondents but also the Respondents' counsel owe a duty of candor to the Arbitral Tribunal. See IBA Guidelines on Party Representation in International Arbitration (2013) at Guidelines 9-11[25] and the related Comments; Rules Regulating the Florida Bar (R. Regulating Fla. Bar) at R. 4.3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous…"), R. 4.3.3 (a) (A lawyer shall not knowingly … make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer"); Code of Professional Ethics of the College of Lawyers and Notaries of Guatemala, Chap. 4, Art. 18 ("Honesty. In conducting matters before judges and authorities, the lawyer must act with probity and good faith, avoiding falsely affirming or denying, or making mutilated [incomplete] or malicious citations" (Translation by the Tribunal); New York Rules of Professional Conduct, 22 N.Y.C.R.R. Part 1200 (2021), Rule 3.3(a) ("A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.")

The Morrison & Foerster Memorandum

90. A somewhat separate dimension of this sanctions proceeding arises from the submission into evidence by Respondents – as an exhibit that accompanied Mr. Joseph's letter of March 30, 2022 in which he reported falsely that Mr. Gaitán and Ms. Echeverría were under indictment -- of the Morrison Memorandum dated February 16, 2022. This memorandum concerned the suitability of Mr. Gaitán to retain the role of Compliance Officer for the Company in light of the misconduct allegations made against him. Respondents first made contact with Morrison by email sent by the Mayora y Mayora law firm on January 17, 2022. (PPT-AMLQ Ex. 68 at 19). The author of the email was an associate in the firm, Carlos Ortega, a member of the firm's counsel team in this arbitration who, like Mr. Briz, had directly received every submission and every Tribunal communication. Mr. Briz was copied on the email. That email did not

[25] Guideline 9 provides that "[a] Party Representative should not make any knowingly false submission of fact to the Arbitral Tribunal." Guideline 10 provides that "[i]n the event that a Party Representative learns that he or she previously made a false submission of fact to the Arbitral Tribunal, the Party Representative should, subject to countervailing considerations of confidentiality and privilege, promptly correct such submissions." Guideline 11 provides in part that "[a] Party Representative should not submit Witness or Expert evidence that he or she knows to be false. If a Witness or Expert intends to present or presents evidence that a Party Representative knows or later discovers to be false, such Party Representative should promptly advise the Party whom he or she represents of the necessity of taking remedial measures and of the consequences of failing to do so."

mention the arbitration or the role of the Mayora firm as co-counsel of record in the arbitration. And we learned from the Morrison partner in charge of the engagement, Ruti Smithline, the co-chair of Morrison's Investigations and White Collar Criminal Defense Group, in her oral testimony on July 22, 2022, that nothing about this arbitration was disclosed to her by any of the persons who communicated with Morrison on behalf of Respondents or were cc recipients of the email communications with Ms. Smithfield– notably Mr. Briz and Mr. Ortega of the Mayora firm, Juan Rodriguez of Carey Rodriguez, and Danielle Kirby and William Méndez Araújo who are attorneys in the employ of Respondents. (Tr. 07/22 at 29-30,98-100,115-116).

91. To situate this January 17, 2022 first-approach email from the Mayora firm to Morrison in the context of DTH's pursuit of a criminal complaint in Guatemala, this was four days after the initial filing of the 2022 DTH criminal complaint against a non-existent individual falsely alleged to have been a DTH employee, and three days prior to the filing of the amended version of that criminal complaint that named Mr. Gaitán and Ms Echeverría and the two members of their team who had helped load Mr. Gaitán's personal belongings into his car on September 27, 2021, as alleged criminal law violators.

92. The email made no mention of the arbitration, and no mention of the criminal complaint. It was subject-titled to Morrison "Guatemalan client-FCPA matter," and stated that Terra and DTH (neither of them a Guatemalan company) "requires an opinion regarding the FCPA Compliance Officer's performance." (PPT-AMLQ Ex. 68 at 19).

93. The next day, Mr. Ortega, in an email to the Morrison managing partner introduced William Méndez Araújo as an in-house attorney for the client "so he can discuss the issue directly" with the Morrison-identified FCPA expert Ruti Smithline. (PPT-AMLQ Ex. 68 at 18). Thus, Morrison was now to be instructed by one lawyer who was an eyewitness to the true facts of September 28, 2021, Mr. Méndez Araújo, and the other eyewitness, Mr. Briz, was in the email loop.

94. Mr. Méndez Araújo had an initial call with Ms. Smithline on January 19, 2022 and Ms. Smithline followed up with an email that said: "William, It was great to meet you today. I can confirm that we have cleared conflicts. Let me know if you want to proceed, and I can send you our standard engagement letter. We should also set up a call to get the more detailed information to be able to write the memo." (PPT-AMLQ Ex. 68 at 16).

95. The absence of an engagement letter from the documents produced by Morrison was a matter of interest to the Tribunal, particular in light of Terra's assertion of attorney-client privilege and the implicated issue of what entity had engaged Morrison and whether for legal advice or expert opinion. Ms. Smithline testified that she could not recall receiving any response to her offer to send a standard engagement letter. (Tr. 07/22 at 124). She testified that she was responsible for not issuing an engagement letter (which we understood to mean that there was no instruction from Respondents to refrain from sending one), due in part to the urgency expressed by Terra to have Morrison's written memorandum on an expedited basis. (Tr. 07/22 at 34-35). However, when asked about the veracity of a statement made by Respondents' co-counsel Juan Rodriguez made in a submission to the Tribunal on June 15, 2022 concerning the attorney-client privilege issue: ("During the relationship, Terra's general counsel, Danielle Kirby, requested on multiple occasions a retainer agreement to evidence this relationship") Ms. Smithline testified that she could not recall any such request by Ms. Kirby. (Tr. 07/22 at 125). Because Ms. Kirby is a witness who failed to testify despite our Order to Respondents that she testify, we find as a fact that there was no such request by Ms. Kirby. As to whether Mr. Rodriguez knowingly presented a false statement to the Tribunal on June 15, 2022, we are not able to make such a determination. According to Ms. Smithline's testimony, she could not recall Mr. Rodriguez having been a participant in any telephone conversation she held with Respondents' representatives concerning the engagement. (Tr. 07/22 at 69). It is therefore possible that Ms. Kirby falsely reported to Mr. Rodriguez the facts that he in turn represented in the June 15 submission, and that as outside counsel he reasonably relied on the veracity of his client's report. On the other hand, whereas the June 15 submission was invited by the Tribunal explicitly as a submission **of evidence** to support Respondents' claim of attorney-client privilege, the obviously hearsay nature of Mr. Rodriguez's statement was inappropriate. Our concerns about Mr. Rodriguez's conduct (and that of Ms. Kirby and Mr. Briz) in regard to Morrison relate only in relatively small measure to this specific misstatement about seeking an engagement letter; our principal concerns arise from the withholding of material facts from Morrison, including every fact about this arbitration.. We return to that subject below.

96. When Mr. Méndez Araújo replied to Ms. Smithline on January 20, 2022 at 4:29 PM "We can proceed," (PPT-AMLQ Ex. 68 at 16) no mention was made of the amended criminal complaint filed that day by Mr. Méndez Araújo's father as DTH criminal complaint co-counsel. And no mention was made of an impending deadline in this arbitration of January 28, 2022 for submissions of written evidence and argument from

both sides concerning Claimants' motion for sanctions based on Respondents' non-compliance with the November 12 Order. We make the foregoing observations as an introduction to another fundamental problem in connection with the Respondents' engagement of Morrison that emerged from Ms. Smithline's oral testimony.

97. Ms. Smithline testified that during the entire course of the engagement, she understood from the client representatives' communications with her that Morrison's client was Terra Towers, that Peppertree and a Goldman Sachs affiliate were investors *in Terra Towers*, that the Company (that is to say, Continental Towers LATAM Holdings) was somehow affiliated with Terra Towers, and that there was no unanimity among the investors of Terra Towers about what to do about Mr. Gaitán's compliance role at Continental. (Tr. 07/22 at 26-32,82,110-113,120). Ms. Smithline, did not appreciate the circumstances sufficiently to obtain an internal conflict check in regard to Goldman Sachs, notwithstanding Goldman Sachs being identified as a "counterpart" in Mr. Ortega's initial email, a step that, according to her testimony, likely would have prevented Morrison from accepting the engagement because Goldman Sachs was an existing client of Morrison. (Tr. 07/22 at 117-119, 123-124, 126). Respondents -- with the direct knowledge of Ms. Kirby and Mr. Rodriguez and Mr. Briz (who were in the email loop, and in the case of Ms. Kirby in the telephone loop as well) -- elected to share essentially none of the facts and factual disputes involved in the arbitration, and none of the context about Mr. Gaitán.. Morrison simply knew nothing about this arbitration,the adversarial positions of the shareholders, or about the adversity between the shareholders concerning Mr. Gaitán's Company CEO role, until after the service of the Tribunal's subpoena in early May and, in most of the details, not before she was examined at the July 22, 2022 hearing. (Tr. 07/22 at 29-30,60, 74, 77, 98-100,111-119).

98. Exacerbating this lack of important information, Respondents affirmatively misled Morrison: Mr. Méndez Araújo on January 25, 2022 sent to Ms. Smithline the Guatemala news articles dated September 2, 2021, that reported that the lawyer representing Mr. Gaitán (in his employment case arising from what he claimed was his wrongful termination by DTH, a detail withheld from Morrison at that point) had been arrested for money laundering (PPT-AMLQ Ex. 68 at 16, 20-31) - but did not include the Guatemala news articles, dated September 30, 2021 reporting that this accusation had thereafter been dismissed. (PPT-AMLQ Ex. 73). The media reportage of the dismissal of the charges was first brought to Ms. Smithline's attention in the exhibits for the July 22, 2022 hearing delivered to her by Claimants' counsel the morning of her appearance. (Tr. 07/22 at 91-93)

99. The day after Mr. Méndez had reported the arrest of Mr. Gaitán's attorney, on January 26, 2022, Ms. Smithline sent to Mr. Méndez a "Discussion Draft" further titled "Considerations and Recommendations Regarding Fraud Allegations Against Chief Compliance Officer". Mr. Méndez responded within the day with a handful of changes, notably including changing the addressee of the Memorandum from Mr. Méndez Araújo to Continental Towers LATAM Holdings. Ltd. ((PPT-AMLQ Ex. 68 at 33). According to Ms. Smithline's testimony, there was client pressure to complete the Memorandum at that point, and with the implementation of Mr. Méndez Araújo's edits and delivery of the Memorandum on Januay 26, 2022, she believed the engagement had been completed. (Tr. 07/22 at 63). Ms. Smithline testified that Terra's representatives did not explain to her the urgency to complete and deliver the Memorandum in the space of a few days (Tr. 07/22 at 61-63). As it happens, Respondents were facing a January 28 deadline for evidentiary submissions to this Tribunal concerning Claimants' sanctions motion It is sufficient here to observe that had Morrison known about that impending arbitration submission deadline, and the fact that the proceeding at that point concerned potential sanctions for defying our November 12 Order to reinstate Mr. Gaitán, Morrison would have been disabused of its misconception – to which Ms. Smithline testified – that the Memorandum was for Terra's internal use only and the engagement likely would have gone in a different direction (Tr. 07/22 at 51-53) –presumably to an ending in view of the Goldman conflict.

100. The Morrison Memorandum remained in its January 26 version up to February 9, 2022 on which date Respondents' in house lawyer Danielle Kirby emailed Ms. Smithline, copying her in-house colleague Mr. Méndez Araújo and Respondents' arbitration co-counsel Juan Rodriguez, and deploying as the Subject "Discussion re Board Reporting". Ms. Kirby wrote: "My name is Danielle Kirby and I work with William Méndez who I understand you have been in contact with regarding the attached legal opinion. Would you have some time tomorrow (Thursday) for a quick call with William, my colleague Juan Rodriguez and myself." ((PPT-AMLQ Ex. 68 at 4)).

101. A Zoom call ensued on February 10, 2022 among Ms. Kirby, Mr. Méndez Araújo and Ms. Smithline. Whether Mr. Rodriguez was on the call, as Ms. Kirby's email had anticipated, Mr. Smithline could not recall. But she recalled the Zoom call as being relatively brief, and in regard to the facts rather "high-level" (Tr. 07/22 at 95) and that the version of the facts Morrison relied on in producing an updated version of the Memorandum was stated in Ms. Kirby's email to Ms. Smithline on February 12, 2022 with cc's to Mr. Méndez Araújo and Mr. Rodriguez. ((PPT-AMLQ Ex. 68 at 48)). The material facts clearly known to Ms.

Kirby and Mr. Rodriguez, and not contained in the February 12 email to Morrison or conveyed to Morrison thereafter by them included but were not limited to:

(1) that there was this pending arbitration and they were co-counsel in it, and the Memorandum was sought to aid in advancing Respondents' position, whether before the Board of the Company or the Tribunal or both,

(2) that Terra had no mandate from the Company to seek legal advice to the Company about Mr. Gaitán's suitability to continue as Company compliance officer, and in fact the Company had its own independent counsel appointed pursuant to a March 19, 2021 agreement signed after the arbitration was underway by the disputing shareholders,

(3) that Peppertree and AMLQ were not investors in Terra, but were investors in the Company pursuant to a shareholders' agreement that contained very specific provisions about corporate governance by its Board and treated a deadlock within the Board between the Peppertree-appointed two directors and the Terra-appointed two directors as a non-adoption of a proposed Board action,

(4) that DTH was an affiliate of Terra by reason of being under the common control of Jorge Hernández, and that DTH owed various obligations to the Company under agreements made in conjunction with the Shareholders' Agreement,

(5) that the Company's Board had effectively deadlocked over Peppertree and AMLQ's invocation of a right in the Shareholders'' Agreement to have the Company sold to a third party, that this was a primary reason for the arbitration, and that the arbitration had proceeded through a Phase 1 concerning that Company sale dispute with a decision from the Tribunal awaited,

(6) that apart from Phase 1 the Tribunal in this arbitration had been mainly occupied with disputes, up to that point resolved against Respondents to the extent they had been resolved, concerning the Respondents' efforts to oust Mr. Gaitán from his Company position and to oust the Company's independent counsel,

(7) that Terra's allegations of wrongdoing by Mr. Gaitán had arisen in the arbitration after the Tribunal's November 12 interim relief order, and DTH's filing of criminal complaints against Mr. Gaitán as submitted in Guatemala were expressly based on facts related to Mr. Gaitán's role as a witness in the arbitration and on a version of the facts surrounding Mr. Gaitán's separation from his employment at DTH that the Tribunal had already rejected in making its November 12 Order,

(8) that, as the Tribunal now knows from the undisputed evidence presented in these proceedings by Mr. Gaitán and Ms. Echeverría, the El Salvador forensic audit that allegedly found embezzlement on a large scale by Mr. Gaitán was not only a false portrayal of perfectly ordinary and

approved sales commissions and business expenses, but was motivated by Mr. Hernández's desire to create a false narrative of the termination of Mr. Gaitán's father, a termination that in fact came about because Mr. Gaitán's father refused to provide a written declaration to support Respondents' arbitration position about Mr. Gaitán by falsely impugning his own son's mental faculties, and

(9) an individual DTH employee named Carlos Guzman, listed on the organizational chart suppled to Morrison as successor country manager to Mr. Gaitán's father (PPT-AMLQ Ex. 68 at 54), was responsible both for the launch in El Salvador of the aforementioned forensic audit but also served as the named complainant in the December 2021 filing in Guatemala of a criminal complaint against Mr. Gaitán that complained that he had committed a series of crimes involving "theft" by reason of having given evidence in this arbitration on October 20, 2021.

102. Ms. Kirby's, Mr. Rodriguez's and Mr. Briz's deception of Morrison would be of no concern to this Tribunal if Respondents had sought out and relied upon the Morrison Memorandum only as a guide to their own conduct. But the record in this case shows that it was submitted to the Peppertree representatives on the Company's Board, and the Company's Shareholders, the morning after it was put in final form (PPT-AMLQ Ex. 82), in support of Respondents' advocacy of Board action to remove Mr. Gaitán. And the form that this sharing took is notable: Writing on Company letterhead, and without copying Morrison, Mr. Quisquinay, claiming to be acting as "Chief Legal Officer" of the Company, delivered the Morrison Memorandum, and stated that "I have consulted US compliance counsel who have issued the legal opinion submitted to you in conjunction with this letter." (Id.) Clearly from the record Mr. Quisquinay had no role in the engagement of Morrison or the development of the Morrison Memorandum, and neither he nor anyone else told Morrison that the Memorandum was being obtained for this purpose and not for the internal use of Terra. The Peppertree Board members shared it with Claimants' counsel, who wrote to Respondents' counsel seeking information and documents concerning the genesis of the Morrison Memorandum on March 9, 2022 -- requests that Respondents declined to answer - wrongfully, as it turns out, because their position that such communications were privileged lacked merit as we later determined (*see* Procedural Order 2022-12). Then, on March 30, 2022, as an exhibit to Respondents' opposition to the Claimants' sanctions motion that we adjudicate here, Respondents presented the Morrison Memorandum to the Tribunal, and argued in Mr. Joseph's letter to us that DTH could not reasonably comply with our Order to publish corrective press notices that would publicly re-associate DTH affiliates with Mr. Gaitán and Ms. Echeverría, because of the allegedly

unacceptable compliance risks that re-association with persons under criminal indictment would present to DTH.

103. Plainly, the reason to present to a Tribunal of US lawyers an opinion delivered by a law firm of Morrison's stature was that this stature would potentially lend credence to the underlying position that DTH's disassociation from Mr. Gaitán was justified and the Peppertree Board Members' refusal to support the Company's disassociation from Mr. Gaitán was unreasonable and potentially a breach of their fiduciary duties. The submission in evidence of the Morrison Memorandum was a substantial factor in the Tribunal's decision to conduct the evidentiary proceeding that now culminates in this Award. If Morrison had reviewed evidence that supported Respondents' purported concerns about Mr. Gaitán, that could have led the Tribunal potentially in one direction. If on the other hand Morrison had been misled about underlying facts, that would lead in another direction and affect the range and severity of sanctions for Respondents' disobedience of our Orders. It turns out the latter was the case.

104. In presenting the Morrison Memorandum as evidence, the legal representatives of Respondents who are counsel in the arbitration, Ms. Kirby, Mr. Rodriguez, Mr. Briz and Mr. Joseph, vouched to the Tribunal for the memorandum's integrity, which necessarily turned on the veracity and completeness of the facts provided to Morrison (We observe again that Mr. Joseph submitted the Morrison Memorandum as an exhibit to his letter of March 30, 2022, along with three other similarly-themed declarations from foreign lawyers made in reliance on the same purported facts). This turns out to have been a serious breach of their duty of candor, because as shown above, each of them either knew or recklessly disregarded that the facts supplied to Morrison were materially misleading by both omission and affirmative misstatement.

AWARD[26]

For the foregoing reasons the Tribunal awards the following as sanctions under AAA Commercial Rule R-58:

[26] The sanction we award with respect to Respondents' counsel takes into account that Respondents continue to be represented by four law firms (three of which have been involved from the outset), plus their in-house counsel, and that the senior lawyer appearing from the New York-based firm that joined the case in May 2022 meets the experience and New York Bar membership requirements we set forth for Respondents' Submission Counsel as that term is defined in Section 2a. of this Award. We also note that three law firms that have represented Respondents during all or some portions of the arbitration have withdrawn – the most recent departure having occurred only one week before issuance of this Award.

1. The stay of proceedings on Respondents' counterclaims provided for in Procedural Order No. 2022-14, entered on the date of this Award, shall be lifted only if Respondents shall demonstrate to the satisfaction of the Tribunal that they have complied in full with this Award, with PFA-1 (unless that Award is vacated or its recognition and enforcement is refused), and our Orders dated November 12, 2021, December 8, 2021 (including full reimbursement to Claimants of any expenditures borne by Claimants for the fees of the Company's counsel under PO 2022-08), and March 15, 2022.

2. In addition:
    a. It shall be a condition of the participation in this case as co-counsel for Respondents by the Mayora y Mayora law firm, the Carey Rodriguez law firm, the Fuerst Ittleman law firm, and Danielle Kirby, Esq. (collectively and individually the "Identified Co-Counsel") that each and every written submission to the Tribunal by or on behalf of any Respondent shall be submitted to the Tribunal by, and with the signature of, a member of the New York Bar having at least 20 years' experience at the Bar and who by making any such submission and providing such signature thereon will be deemed to represent to the Tribunal, upon penalty of disqualification from further appearance in this arbitration in case of violation, the matters that are considered to be associated with an attorney's signature in a submission to a court of the United States under Rule 11(b) of the Federal Rules of Civil Procedure ("Respondents' Submission Counsel"). The inclusion of any of the Identified Co-Counsel in the signature block or otherwise as associated with any such submission shall be a representation by them that they have also complied with the obligations of Rule 11(b) with respect to such submission.

    b. Respondents shall designate the attorney who shall assume the role of Respondents' Submission Counsel within 14 days from the date of this Award. In the alternative, if Respondents elect not to comply with the foregoing, then the law firms Mayora y Majora, Carey Rodriguez, and Fuerst Ittleman, and Danielle Kirby, shall no longer appear as co-counsel in the proceedings, shall not be entitled to received Confidential Information under the Confidentiality Order, and shall be removed from the counsel list by the ICDR. Respondents' failure to designate a Respondents' Submission Counsel under this paragraph within 14 days of the Award, or the failure of such counsel to have filed a notice of appearance in this proceeding within that time period (in the event the designated counsel has not already appeared in this matter) shall be deemed such an election not to comply.

3. No application by Respondents to the Tribunal will be entertained for the removal or suspension from their Company positions of Mr. Gaitán or Ms. Echeverría based upon conduct occurring prior to July 22, 2022 (the date of the last proceeding prior to this Award). The Tribunal makes no Award with respect to the conditions that would need to be satisfied for any such application based on conduct subsequent to July 22, 2022.

4. No claim against Claimants by Respondents will be allowed based upon the Peppertree-appointed directors having failed to support the removal of Mr. Gaitán and Ms. Echeverría from their Company positions on the basis of their conduct up to July 22, 2022.

5. As compensation to Claimants for their share of the costs for the Tribunal's fees and expenses associated with all of the proceedings relating to Mr. Gaitán and Ms. Echeverría from October

2021 to the present time, which the Tribunal finds to have been approximately $512,000[27], Respondents shall pay to Claimant Telecom Business Solution LLC ("TBS"), as a joint and several obligation of each of them, the sum of $321,000, to be paid not later than 30 calendar days after the issuance of this Partial Final Award.[28] TBS shall receive such payment on behalf of the Claimants jointly and shall distribute the payment in proportion to the Claimants' respective contributions toward the deposits for the fees and expenses of the Tribunal, or as the Claimants may otherwise agree. Interest shall accrue on any unpaid amount at the rate of 2.8 % per annum until paid. Such relief is without prejudice to Claimants' rights to seek recovery of reasonable attorneys' fees and expenses for such proceedings, including sums advanced by Claimants for the fees and expenses of Company counsel, to the extent they have not yet been awarded or ordered to be paid.

We, THE UNDERSIGNED ARBITRATORS, do hereby certify, for purposes of Article III of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded June 10, 1958, and Article 4 of the Inter-American Convention on Commercial Arbitration concluded January 30, 1975, that this Second Partial Final Award is made in New York, New York, USA.

August 12, 2022	Type text here
Date	Marc J. Goldstein, Chair
August 12, 2022	
Date	Mélida N. Hodgson, Arbitrator
August 12, 2022	
Date	Richard F. Ziegler, Arbitrator

I, Marc J. Goldstein, Chair, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Second Partial Final Award.

August 12, 2022	
Date	Marc J. Goldstein, Chair

[27] This is based upon ICDR Finance records showing total disbursements for fees and expenses of the Tribunal of ~$912,000 as of the date of this Award, of which $400,000 was found in our first Partial Final Award to have been attributable to the Phase 1 proceedings that culminated in that Award.

[28] The awarded sum of $321,000 has two components: (i) Claimants' 50% share of deposits paid by the Claimants as a group and the Respondents as a group in the sum of ~$382,000, i.e. $191,000, and (ii) Claimants' payment of an unpaid sum due for deposits from the Respondents in the sum of ~$130,000. The balance of the total deposits collected by ICDR on a 50-50 basis from the Claimants and from the Respondents, $400,000, was the subject of our Award to Claimants of $200,000 for deposits for the fees and expenses of the Tribunal in our first Partial Final Award dated February 24, 2022.

I, Mélida N. Hodgson, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Second Partial Final Award.

August 12, 2022_____ _____

Date Mélida N. Hodgson, Arbitrator

I, Richard F. Ziegler, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Second Partial Final Award.

August 12, 2022____ _____

Date Richard F. Ziegler, Arbitrator

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Date

Richard F. Ziegler, Arbitrator

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August 12, 2022
Date

Richard F. Ziegler, Arbitrator